In the Supreme Court
of the
United States

OCTOBER TERM, 1915.

No. 46

PORTUGUESE-AMERICAN BANK
OF SAN FRANCISCO,

Appellant,

vs.

PAUL L. WELLER, JOHN DARDIS, Trustee of Metropolis Construction Company, Bankrupt, and THOMAS P. BOYLE,

Appellees.

BRIEF FOR APPELLANT.

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Filed this ____ day of April, 1916.

JAMES D. MAHER, *Clerk.*

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Fourth St. National Bank v. Yardley, 165 U. S. 634;

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No. 248

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Appellees.

BRIEF FOR APPELLANT.

Statement of the Case.

Nature of the Case and Questions Involved.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Ninth Circuit, entered March 9, 1914, reversing a decree rendered by the United States District Court for the Northern District of California, First Division,

in favor of appellant Portuguese-American Bank of San Francisco, and directing that a decree be entered for appellee Welles.

The suit arose out of a controversy about the right to the demand or warrant for a fourth progressive payment of $6,830.85, *already* earned by the Metropolis Construction Company and ordered paid by the board of public works under a sewer construction contract with the board of public works of San Francisco. Appellant claims under an assignment made to it by the Metropolis Construction Company as security for loans of $35,000.00. Appellee Welles claims as a subcontractor asserting a claim in the nature of a *garnishment* acquired by giving a notice under the provisions of Section 1184 of the Code of Civil Procedure of California. Appellee Daniel, as trustee of the bankrupt Metropolis Construction Company, unites in the claim of Welles. Appellee Boyle was and is auditor of the City and County of San Francisco, and makes no claim on either his own behalf, or on behalf of the city.

The cause was referred to a special referee and examiner on April 15, 1912, to find the facts and his conclusions of law therefrom, and he found in favor of appellant on all the issues, and that appellant was entitled to the demand. Exceptions of appellees Welles and Daniel to this report were overruled by the District Court on January 18, 1913, and a decree in favor of appellant was thereafter signed.

From this decree of the District Court Paul I. Welles and John Daniel, trustee, appealed to the Circuit Court of Appeals; that court held that appellant's rights were prior to those of Welles if it had a valid assignment of the fund. On this point, however, it reversed the decree of the lower court on the ground that the sewer construction contract provided that the contractor should not assign any of the moneys payable under the contract or his claim thereto, without the consent of the board of public works, and that, as such consent had not been obtained to the assignment in question, the failure to obtain it rendered the assignment *absolutely void.* In so holding and deciding, appellant contends that the Circuit Court of Appeals erred.

Statement of Facts.

(Note: The facts in this case were found by the referee on two references. One report was filed October 14, 1911 (p. 92 Tr.), and the other, July 16, 1912 (p. 132 Tr.). On the hearing pursuant to the second order of reference counsel for appellee Welles offered in evidence without objection the first report, filed October 14, 1911 (p. 263 Tr.), and stipulated that all the testimony taken, and exhibits introduced on the former hearing, might be considered as evidence on the final hearing, but should not be used to change the findings of fact as made (pp. 266, 267 Tr.). The cause was submitted on the record as it stood and the same facts were found (p. 132 Tr). The facts found by the referee are, therefore, not disputed deductions from conflicting evidence.)

On July 22, 1910, the board of public works of the City and County of San Francisco, under and by virtue of the authority granted to it as such by

Article VI of the Charter of the City and County of San Francisco, entered into a written contract with the Metropolis Construction Company, a corporation, for the construction of a sewer and appurtenances in Kentucky and Fourth streets, in said City and County, for the estimated sum of $33,182.00. The contract provides that the work will be done under the direction and to the satisfaction of said board of public works, and also provides that payments were to be made as the work progressed, called "progressive" or "progress" payments, as provided in the specifications accompanying the contract, which, are, in part, as follows:

"PAYMENTS.

In order to assist the contractor to prosecute the work advantageously, the city engineer shall on or about the last day of each month make an estimate of the value of the labor done and materials incorporated into the herein proposed work by the contractor.

The first estimate shall be of the value of the labor done and materials incorporated into the herein proposed work since the contractor commenced the performance of the contract on his part and every subsequent estimate except the final estimate shall be of the value of labor done and materials incorporated into the herein proposed work since the last preceding estimate was made. Provided, however, that no such estimate shall be required to be made, when in the judgment of the city engineer the total value of the labor done and materials incorporated into the herein proposed work since the last preceding estimate amounts to less than $5,000.00. Such estimates need not be made by strict measurements but they may be approximate only and shall be based upon the whole

amount of money that will become due according to the terms of the contract when the whole of the herein proposed work shall have been completed.

Upon each such estimate being made, the City and County of San Francisco will pay or cause to be paid to the contractor in the manner provided by law, an amount equal to 75 per cent of said city engineer's estimate.

Payments may at any time be withheld if the work is not proceeding in accordance with the contract, or if, in the judgment of the city engineer, the contract is not complying with the requirement of the contract and specifications." (p. 135 Tr.)

The specifications annexed to the contract and referred to in the contract contain the following provisions:

"SUB-CONTRACTS. The contractor shall constantly give his personal attention to the faithful prosecution of the work; he shall keep the same under his personal control and shall not assign by power of attorney or otherwise, nor sublet the whole or any part thereof without the consent or authorization of the board of public works.

With his request to the board of public works for permission to sublet or assign the whole or any part of the herein required work he shall file a copy of the contract which he proposes to enter into for subletting or assigning the whole or any part of the herein required work and he shall state the name and place of business of such sub-contractor as he intends employing together with such other information as will enable the board of public works to determine the responsibility and standing of said sub-contractor.

No sub-contractor will be considered unless the original contract between the contractor and the board of public works is made a part thereof, nor unless it appears to the board of public works that the proposed sub-contractor is in every way reliable and responsible and fully able to undertake that portion of the work which it is contemplated to sublet, and to complete said work in accordance with these specifications and to the satisfaction of the board of public works.

No sub-contract shall relieve the contractor of any of his liabilities or obligations under this contract. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the board of public works." (p. 136 Tr.)

On or about July 30, 1910, the contract was sublet to Paul I. Welles by the company, but there was never any formal consent by the board of public works thereto (p. 137 Tr.). But Mr. Welles acted on the job with the knowledge of the board. Under the subcontract the company agreed to pay Welles 90 per cent of the moneys to be received by it from the city under its said contract. The company proceeded with the work under the contract, through its subcontractor, Mr. Welles, until bankruptcy proceedings. After that the work was completed by Mr. Welles under receivers and trustee in bankruptcy.

The following portions of the provisions of the Charter of San Francisco, found in Chapter I of Article VI, relate to contracts of this kind:

"Sec. 9. The board of public works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the supervisors:

* * * * * *

2. Of all sewers, drains and cesspools, and of the work pertaining thereto or to the drainage of the city and county;

* * * * * *

7. Of any and all wires and conduits, the collection and disposal of street refuse, garbage and sewage, and the designing, construction and maintenance of the sewerage and drainage systems of the city and county"; (p. 270 Tr.)

"Sec. 11. Said board shall appoint a civil engineer of not less than five years' practical experience as such, who shall be designated the city engineer. He shall hold his office at the pleasure of the board.

He shall perform all the civil engineering and surveying required in the prosecution of the public works and improvements done under the direction and supervision of said board, and shall certify to the progress and completion of the same, and do such other surveying or other work as he may be directed to do by said board or by the supervisors. * * *"

* * * * * *

"Sec. 22. The work in this article provided for must be done under the direction and to the satisfaction of the board of public works; and the materials used must be in accordance with the specifications and be to the satisfaction of said board, and all contracts provided for in this article must contain a provision to that effect, and also, that in no case, except where it is otherwise provided in this Charter will the city and county, or any department or officer thereof, be liable for any portion of the expense, or in the case of improvement of streets,

for any delinquency of persons or property assessed.

When said work shall have been completed to the satisfaction and acceptance of the board, it shall so declare by resolution, and thereupon the board shall deliver to the contractor a certificate to that effect." (p. 270 Tr.)

It was stipulated that the Charter of the City and County of San Francisco may be deemed to have been admitted in evidence and may be used in argument (pp. 269, 270 Tr.).

On December 3, 1910, the said engineer made his fourth estimate of progressive work under the contract (pp. 138 and 217, 218 Tr.), which estimate was approved by the board of public works on December 5, 1910. On the latter day the board of public works, by its resolution, authorized a fourth progress payment of $6,830.85, to be made to the Metropolis Construction Company (pp. 138 and 256, 257 Tr.). On the same day a demand for that sum was presented by the Metropolis Construction Company to, and approved by, the board of public works, and was forwarded to the board of supervisors of said city and county for approval (pp. 96, 138, 213, 214 Tr.). This approval was given on January 3, 1911, and that of the mayor of the city on January 4, 1911 (p. 145 Tr.).

On December 5, 1910, after the fourth progress payment had been authorized, Chris Emille, who was then the president and general manager of the Metropolis Construction Company, accompanied by L. F. Strong, its assistant secretary, went to the

Portuguese-American Bank for the purpose of obtaining a loan of $30,000, and offered as security to assign to the bank certain demands on the treasury of the City and County of San Francisco in favor of the company, and the moneys represented thereby aggregating about $38,000. The security so offered was an order on the auditor of the city and county as follows:

"San Francisco, Cal., December 5, 1910.
Thomas F. Boyle, Esq.,
Auditor of the City and County
of San Francisco.
Dear Sir:—

You will please take notice, and you are hereby notified, that the Portuguese-American Bank of San Francisco, is hereby authorized and empowered to draw the warrants in favor of the undersigned against City and County, for the amounts of money hereinafter set forth, and being progressive payments on account of the contracts hereinafter set forth, to wit:

1st:—Warrant for the sum of $6,830.85, being fourth progressive payment on account of contract dated January 5th, 1910, for Kentucky and Fourth streets Sewers, the contract being between the undersigned and said City and County under the bond issue of 1903.

2nd:—Warrant for the sum of $2,173.17 being fourth progressive payment on account of contract between the undersigned and said City and County dated March 25th, 1910, for Lower Sunset District Sewer, and being contract No. 36.

3rd:—Warrant for the sum of $19,167.20, being fourth progressive payment on account of contract between the undersigned and said City and County dated June 22nd, 1910, and

being for construction of sewer in 7th Street, Howard to Hubbell Streets under contract No. 31.

METROPOLIS CONSTRUCTION
COMPANY, INC.
By Chris Emille,
President.
By L. F. String,
Ass't Secretary.

(Seal of Metropolis Construction Co.)
Received Auditor's Office Dec. 6, 1910.
Ans. H. J."
(pp. 138, 139, Tr.)

The first warrant mentioned in said order for the fourth progressive payment on said contract for sewers and appurtenances in Kentucky and Fourth Streets is the demand involved in this suit (p. 140 Tr.).

With this order the officers of the company presented certified copies of three resolutions of the board of public works, one of which was the resolution allowing the company the sum of $6,830.85 as the fourth progress payment under the contract (p. 140 Tr.). *This resolution has never been revoked* (p. 140 Tr.).

Before making the loan the bank required that this order be presented to the auditor's office for acceptance. Complying with this requirement the officers of the company delivered a copy of the order to the auditor and had the original stamped "Received Auditor's Office Dec. 6, 1910. Ans. H. J." (p. 141 Tr.).

The original order bearing this stamp was then presented to the bank and on December 6, 1910, the bank loaned the company the sum of $30,000, taking the order as security for the company's note (p. 141 Tr.).

When he delivered this order to the bank, together with the copies of the resolutions, Chris Emille, the president and general manager of the company, intended that it should be a complete assignment of the full amount of the three warrants set forth therein (p. 141 Tr.).

On the next day, December 7, 1910, at the request of the company, the bank loaned to it an additional sum of $5000.00 to pay labor on the same security, and the company delivered its second note to the bank for said amount (pp. 141-142 Tr.).

This money, $35,000, was placed to the credit of the company by the bank and was drawn out by the company by checks, excepting the sum of $1.06 (p. 142 Tr.). No part of this money so drawn out has been repaid (p. 142 Tr.).

At the time these loans were made no notice had been given or filed by the appellee Welles requiring the city to hold back money to pay him on his subcontract, nor was his subcontract, or any notice thereof, filed with the board of public works, but on December 12 and 16, 1910, appellee Welles, acting under Section 1184 of the Code of Civil Procedure of the State of California (Edition of 1909), served notice on the city to withhold the

money due or to become due to the company (pp. 149, 150 Tr.). The portion of Section 1184 of the Code of Civil Procedure relating to this matter is as follows:

> "* * * Any of the persons mentioned in section eleven hundred and eighty-three, except the contractor, may at any time give to the reputed owner a written notice that they have performed labor or furnished materials, or both, to the contractor, or other person acting by authority of the reputed owner, or that they have agreed to do so, stating in general terms the kind of labor and materials, and the name of the person to or for whom the same was done or furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished or both.
>
> Such notice may be given by delivering the same to the reputed owner personally, or by leaving it at his residence or place of business, with some person in charge, or by delivering it to his architects, or by leaving it at their residence or place of business, with some person in charge, or by posting it in a conspicuous place upon the mining claim or improvement.
>
> No such notice shall be invalid by reason of any defect of form, provided it is sufficient to inform the reputed owner of the substantial matters herein provided for, or to put him upon inquiry as to such matters.
>
> Upon such notice being given, it shall be the duty of the person who contracted with the contractor to, and he shall, withhold from his contractor, or from any other person acting under such reputed owner, and to whom by said notice the said labor or materials, or both, have been furnished, or agreed to be furnished, sufficient money due, or that may become due to such contractor, or other person, to answer

such claim and any lien that may be filed therefor for record under this chapter, including counsel fees not exceeding one hundred dollars, in each case, besides reasonable costs provided for in this chapter."

Thereafter and on December 19, 1910, a petition in involuntary bankruptcy was filed against the company, and on January 5, 1911, it was adjudged a bankrupt. On February 1, 1911, John Daniel was appointed trustee of the bankrupt company.

Owing to the conflicting claims made upon him, Thomas F. Boyle, auditor of the City and County of San Francisco, refused to audit or deliver the demands and on January 26, 1911, the bank filed suit in the Superior Court of the City and County of San Francisco, State of California, against said auditor to compel him to audit and deliver to it the possession of said demands. While the suit was pending and on April 18, 1911, appellee Welles filed the present suit in equity in the United States District Court for the Northern District of California, First Division, against the bank, the trustee in bankruptcy and Auditor Boyle.

On December 26, 1911, the case was referred to a special referee and examiner on final hearing to hear the testimony and proofs and find the facts on the issues arising on the pleadings and to report his findings and conclusions to the court (pp. 119, 120 Tr.).

On July 16, 1912, the special referee and examiner filed his finding of facts and conclusions of law,

finding that the fourth progress payment was assigned to the bank, and that the assignment and the right of the bank to receive the proceeds thereof, were not affected by the notice to withhold made by Welles. This report of the referee is to be found on pages 132 to 172 of the transcript.

Thereafter and on January 18, 1913, the District Court made and entered its order confirming the report of the special referee and examiner and directing a decree for the appellant bank (p. 185 Tr.) and on January 30, 1913, the decree in favor of appellant was signed by the judge (p. 186 Tr.).

Specification of Errors.

The decree of the Circuit Court of Appeals herein is erroneous in the following particulars:

1. The court erred in holding and deciding that the provisions in the specifications annexed to the contract known as "Contract No. 6-A," between Metropolis Construction Company and the board of public works of the City and County of San Francisco, State of California, that the contractor "shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the board of public works," made void the assignment of the fourth progress payment by the said company to the Portuguese-American Bank of San Francisco.

2. The court erred in holding and deciding that the provisions in said contract against assignment, unless with consent of the board of public works, were for the purpose of protecting subcontractors in their equitable rights to unpaid funds in the hands of the city in case notice should be given under Section 1184, Code of Civil Procedure of California.

3. The court erred in holding and deciding that the Portuguese-American Bank of San Francisco was not the assignee of said fourth progress payment.

4. The court erred in holding and deciding that said assignment required the consent of the board of public works.

5. The court erred in not holding and deciding that the assignment held by the Portuguese-American Bank was good and valid as against the claims of Paul I. Welles.

6. The court erred in not holding and deciding that the provisions of said contract against assignment unless with consent of the board of public works were inserted for the benefit of, and could be invoked by, the City and County of San Francisco only.

7. The court erred in not affirming the decree of the District Court.

8. The court erred in reversing the decree of the District Court.

Jurisdiction.

This appeal is taken under Section 241 of the Judicial Code, approved March 3, 1911, in effect January 1, 1912, re-enacting the final clause of Section 6 of the Act of March 3, 1891.

Hewit v. Berlin Machine Works, 194 U. S. 296;

Huntington v. Saunders, 163 U. S. 319;

Knapp v. Milwaukee Trust Co., 216 U. S. 545;

Houghton v. Burden, 228 U. S. 161;

Hobbs v. Head & Dowst Co., 231 U. S. 692.

ARGUMENT.

Appellees urged the following points in the Circuit Court of Appeals:

First. That the assignment to the appellant bank was null and void because made in violation of the provision in the contract requiring consent of the board of public works.

Second. That the facts found were not sufficient to sustain the bank's claim of assignment.

Third. That appellee Welles was entitled to priority by virtue of his notice to withhold under Section 1184 of the Code of Civil Procedure of California.

Fourth. That a certain "memorandum opinion" and minute order of December 12, 1911, made on the hearing of an order to show cause prior to the filing of the bank's answer and the argument and submission of the cause on its merits, was conclusive as the law of the case and fixed the right of Welles to a decree in his favor in the absence of changed findings of fact on final hearing.

In its opinion the Circuit Court of Appeals considers and disposes of the first and third points only. No reference is made to the second and fourth points.

Appellant is unable to ascertain whether appellees will confine their argument to the first point, on which the Circuit Court of Appeals reversed the decree of the District Court, or will endeavor to support the decree of the Circuit Court of Appeals upon some ground other than that stated in its opinion, and for that reason deems it advisable to consider in this brief all the points urged before the lower court.

In the presentation of its argument, appellant will first take up the point on which the Circuit Court of Appeals based its decree of reversal.

Point One. Validity of the Assignment.

A.

THE PROVISION IN THE CONTRACT THAT THE CONTRACTOR "SHALL NOT, EITHER LEGALLY OR EQUITABLY, ASSIGN ANY OF THE MONEYS PAYABLE UNDER THIS CONTRACT OR HIS CLAIM THERETO UNLESS WITH THE LIKE CONSENT OF THE BOARD OF PUBLIC WORKS", DID NOT MAKE NULL AND VOID AN ASSIGNMENT OF MONEYS EARNED BY THE CONTRACTOR, AND THEN ASSIGNED WITHOUT SUCH CONSENT.

THIS PROVISION IS BUT A COVENANT INSERTED FOR THE SOLE BENEFIT AND PROTECTION OF THE CITY; AND THE CITY ALONE, OR THE BOARD OF PUBLIC WORKS, AS ITS AGENT, CAN COMPLAIN OF A BREACH THEREOF.

The case of *Burck v. Taylor,* 152 U. S. 635, is mainly relied upon in the opinion of the Circuit Court of Appeals to support the conclusion that an assignment by the contractor of money earned by him in performance of his contract, and allowed by the proper officials as a progress payment, is void if made without the consent of those officials where the contract provides that the contractor shall not assign moneys payable under the contract unless with their consent, and that its invalidity can be asserted by a junior claimant against the senior assignee.

Several other cases, especially *City of Omaha v. Standard Oil Co.,* 55 Neb. 337, and *Murphy v. City of Plattsmouth,* 78 Neb. 163, are also cited in support of the above proposition. These cases were all prosecuted against the contracting party *whose consent had not been obtained,* and involved con-

tracts *executory on both sides.* Several of these cases rely upon *Burck v. Taylor* as an authority supporting the conclusion that an assignment of *any contract* without the consent of the other contracting party is void if the contract contains a provision requiring such consent. The case of *Burck v. Taylor* does not so decide.

The opinion in *Burck v. Taylor,* as applied to the facts then before this court, does not announce the rule contended for; and an erroneous construction has been placed upon the language used, due to the fact that *portions* of the opinion are quoted as stating general principles of law, applicable to all contracts, when those statements were in fact limited and explained by the peculiar nature of the case under consideration.

In that case the plaintiff sought to recover from the defendant $231,470 alleged to be his share of the profits of a contract made by the State of Texas for the erection of its capitol building.

The State of Texas executed a contract with one Schnell for the erection of this building, a clause (the 26th) of which is as follows:

> "It is further agreed, covenanted and stipulated by the party of the second part that this contract shall not be assigned, in whole or in part, by the party of the second part without the consent in writing of the party of the first part signed by the governor of Texas and the capitol building commissioners, with the advice and consent of the heads of departments."

Plaintiff claimed under an agreement entered into before the work was done between Schnell and plaintiff's predecessor, which purported to assign to the latter an interest in the contract. The consent of the State to this assignment was not given.

Defendant is the assignee of Schnell and others of the entire contract. The assignment to him had the consent of the State and he "furnished all the means and did all the work of building the capitol" and he had no knowledge of any claim of the plaintiff.

The court decided that under the circumstances Burck acquired no rights against Taylor.

There is *no* statement in the opinion that the assignment to plaintiff was void.

That decision cannot be correctly apprehended by reading isolated extracts from it, and in view of the misapprehension as to what was decided we respectfully urge that it be carefully examined, and in the light in which the facts appeared to Mr. Justice Brewer. He states:

> "That which arrests the attention is that, though the defendant furnished all the means and did all the work of building the capitol, and although the authorities of the state expressly recognized him as the contractor, bound in all respects to carry out the contract with the state in the same manner as the original contractor, and though he had no knowledge of any claim of plaintiff, the court is asked to recognize the latter as the owner of one thirty-second of the profits of the contract, and to compel the defendant to pay him that amount.

While only one thirty-second of the profits is asked for, the rule would be the same if thirty-one thirty-seconds were sued for, and the first and principal question which arises is, whether these transactions between Schnell and A. A. Burck and between A. A. Burck and plaintiff had, without the knowledge of the defendant, operated to create in the plaintiff a valid claim to a share of the profits. The contract in its twenty-sixth clause stipulated that there should be no assignment in whole or in part by the contractor without the consent in writing of the state authorities. No such consent was given to the assignment by Schnell to Burck, nor does it appear that the state ever in any form recognized the plaintiff, or his immediate grantor, as having any interest in, or control of, the contract, or any part thereof. He was to both the state and the defendant, who did the work, an unknown party until after the full completion of the contract, when for the first time he appears claiming an interest in the profits by virtue of an assignment and transfer, made before the work was done and in disregard to the terms of the contract."

On page 650, he states:

"By the three instruments of January 31, May 9, and June 20, 1882, this contract was wholly transferred to and accepted by the defendant. This was while the contract was executory and before the work was done, and these transfers were with the written consent and approval of the state authorities, and by them the state in terms recognized 'Abner Taylor as the contractor, bound in all respects to carry out the contract with the state of Texas in like manner as the original contractor, Matthias Schnell, was bound.' In other words, by the consent of parties, and in accordance with express provisions of the contract, before

> the work was done Abner Taylor, the defendant, was substituted for Schnell as the contractor. It was precisely the same as though the contract with Schnell had been surrendered and a new one made with Taylor. The contract was still executory; nothing had been earned by Schnell, and nothing was due to him. He steps out of the contract and Taylor steps in; Taylor is accepted as the contractor and proceeds with the work. Would it not be strange if, after having thus completed the contract, some person could, on the strength of an unknown transfer to the entire profits of the contract made before the transfer to Taylor, compel the latter to pay to him such entire profits? And yet if one thirty-second of the entire profits can be so obtained, all the profits could, in like manner have been obtained."

It is true that Mr. Justice Brewer states that the contract was unassignable without consent, because of the contract provision requiring consent, but this merely means it was unassignable in the same sense that a lease is said to be unassignable, without consent of the landlord, if there is a provision in it requiring consent, and still it is well settled that an assignment of a lease in violation of such a provision is not void.

The effect of the unassignability of the contract was not that the assignment would be *void,* but that the assignment would give the assignee no right to take part in the work if the State objected or to require the State to deal with him or *to interfere with the State's right with consent of Schnell to substitute another for Schnell.*

That he did not decide that Burck's assignment was *void* is shown by the statement of Mr. Justice Brewer, page 652:

> "All that could ever have been acquired by an assignment or transfer by Schnell, without the consent of the state, was a right to maintain an independent action against him for whatever share of the profits he had attempted to transfer. But that obligation would be personal to Schnell, and was not assumed by the defendant * * *."

Here the court holds that if Schnell made profits the assignment would operate to give Burck a right to them. The assignment therefore *was not void.* If the assignment was *void* the action would not be for the *profits.*

Mr. Justice Brewer also states, page 653:

> "we have thus far considered this case on the assumption that the defendant proceeded with the completion of his contract in ignorance of any transfer to plaintiff."

He then proceeds in opinion to show that Taylor had no notice of Burck's right.

If Burck's assignment was void, it would be entirely immaterial whether Taylor had notice of it or not.

The Circuit Court of Appeals quotes the following from *Burck v. Taylor:*

> "It may be conceded that, primarily, it was a provision intended, although not expressed, for the benefit of the state, and to protect it from interference by other parties in the performance of the contract, to secure the constant

> and sole service of a contractor with whom the state was willing to deal and to relieve itself from the annoyance of claims springing up during or after the completion of the contract in favor of parties of whose interests in the contract it had no previous knowledge, and to the acquisition of whose interests it had not consented. Concede all this, and yet it remains true that it was a stipulation which was one of the terms of the contract and binding upon the contractor, and equally binding upon all who dealt with him."

and therefrom draws the conclusion that clauses in contracts prohibiting assignment without consent are *not* for the benefit of the contracting parties only and that any one may take advantage of them.

This conclusion is obviously erroneous. The court holds, *not* that the assignment without consent was *null* and *void;* not that the provision was not for the benefit of the State; *but* that after it was made the State, under the terms of its contract, had accepted Taylor as the contractor in place of Schnell and with Schnell's consent; that Schnell was bound by this substitution, and that all who dealt with him were equally bound thereby.

Clause 26, in effect, reserved to the State the right, with Schnell's permission, to substitute another in his place to carry on the contract.

That this conclusion is erroneous will appear when it is considered that in making this statement, Mr. Justice Brewer had under consideration the argument of plaintiff's counsel, of which he states, (p. 646):

"It is earnestly insisted by counsel that this provision forbidding an assignment without the written consent of the state authorities, was solely for the benefit and protection of the State; that it did not restrict or interfere with the right of the contractor to dispose, in any way he saw fit, of an interest in the contract, or the profits thereof, so long as the party to whom such transfer was made attempted no interference with the actual work, and presented no claim against the State. The contract in the possession of the contractor was his property, and the profits arising therefrom, and any interest therein, were as much the subject of disposal as any other property, and the only limitation was one for the benefit of the state and could not be claimed by any subsequent assignee from the contractor."

If the above contention of Burck's counsel was correct, then the State, when it made its contract with Schnell, would be at his mercy in securing a capital, for if the profits of the contract were property, subject to disposal the same as any other property, then Schnell as soon as the contract was awarded to him could secretly assign the profits and divest himself of the benefits to be derived by performance. Then he could assign the contract to another who would be accepted by the State and who would perform it. After the latter had earned the money by full performance, then the first assignee would come in and take the profits.

Obviously, if such a doctrine prevailed it would be impossible for the State to deal with an assignee in any event, and as impossible for any assignee with the State's consent to perform the contract

with assurance of receiving any of the compensation.

A *purely executory contract,* as this court points out in *Burck v. Taylor,* page 653, is composed of benefits and obligations, and the benefits cannot be separated from the obligations as a coupon from a bond and sent floating through the channels of commerce. The contractor is bound to perform his obligations, and only upon performance does he become entitled to the benefits. So long as he fails to perform, he gets no claims under his contract, and his assignees stand in his shoes.

Hence, it plainly appears that the decision in *Burck v. Taylor* does not proceed upon the theory advanced by the Circuit Court of Appeals in this case. Nor does it support the *dicta* in the Nebraska cases to which the Circuit Court of Appeals refers. We use the word *dicta* advisedly, because in those cases, and in all the cases cited by the appellees and the court, the suits were brought by assignees against the *party whose consent was required,* and who set up the lack of consent in defense. In some cases the assignees recovered, in others they failed; but in none of these cases was it *necessary* to decide that the assignment was *void* in the strict sense, and there is nothing in the opinions to show in what sense the courts used the word.

Such assignments may be *unenforceable* against the debtor who sees fit to invoke the defense. But it is to be remembered that in this case the City of San Francisco makes no defense,—is merely a

stakeholder,—as appellees allege; that Welles claims no interest in the contract, but is a creditor of the contractor and has given the city notice to withhold money due the contractor under Section 1184 of the Code of Civil Procedure of California; that appellee Daniel claims as trustee in bankruptcy.

Even if *Burck v. Taylor* does decide that an assignment of an *executory contract* in violation of a provision restricting assignment is void, it would not support appellee's contention that the assignment of the moneys already earned (a debt due from the city) is void.

The cases of *Fortunato v. Patten,* 147 N. Y. 277, and *Hackett v. Campbell,* 10 A. D. N. Y. 523, had under consideration *Burck v. Taylor,* and they decided it was not applicable to cases in which the restriction against assignment related to the payments due under municipal contracts.

In *Hackett v. Campbell,* at page 525, the court states:

> "The appeal is based upon the provision of the contract quoted, the appellants' contention being that it forbids any assignment of moneys earned under the contract and effectually prevents the respondent's order from operating as an equitable assignment. To sustain their contention the appellants cite *Burck v. Taylor* (152 U. S. 634). We think the rule there applied has no application to the case before us. In *Fortunato v. Patten* (147 N. Y. 277) the Court of Appeals of this State decided that a similar provision in a contract with the city of

> New York was inserted solely for the benefit of the city, and that its sole function was to prevent any claim being aserted against the city in the absence of its consent.
>
> The court there distinguished between a provision forbidding the assignment of money due under a contract and one forbidding the assignment of the contract itself. The case of *Burck v. Taylor* (*supra*) was of the latter character. The case before us was of the first. The provision in the contract with Campbell was that no portion of the amount due on the contract should be assigned without the consent of the committee of the board of education, and the case cannot be distinguished in this respect from that of *Fortunato v. Patten.*"

We do not dispute that *the parties* to a contract may insert a provision against assignment, but we deny that such a provision has ever been given the effect contended for by appellees.

The quotation by the Circuit Court of Appeals from *Delaware County v. Diebold Safe Co.*, 133 U. S. 473, 488 (p. 316 Tr.), does not support the appellees. It refers to a contract under which the promisee had to perform something before earning money and in which *no element of personal confidence* is involved. This is shown by a fuller quotation, which is as follows:

> "A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable. But when rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of

> personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract including both his rights and his obligations cannot be assigned without the consent of the other party to the original contract."

The latter portion of this quotation from the opinion by Mr. Justice Gray, is of the utmost importance, as it shows upon what facts his mind was dwelling at the time. The case did not involve the question of the right of the contractor to *money earned by him and which the county was bound to pay,* but the right of a subcontractor under a subcontract made by the contractor, without the county's consent, to make a claim against the county under a subcontract to which it had never agreed. The case involved propriety of instructions to the jury, in which no question of consent was submitted. The court holds that a *single executory contract* cannot be parted into *various fragments,* without the *consent of the debtor.* The court states that the statutes of Indiana and judicial expositions of them by the Supreme Court of the State are *inconsistent* with the theory that the contractor may split up and assign different portions of *one entire contract.* The following quotation from this case contains the gist of the decision:

> "The original contract of the county commissioners was for the construction by Meyers & Son of the building as a whole by a certain date; for the payment to them by the Commissioners of a gross sum of $20,000 for such construction, upon an accounting with them from

time to time; and for the payment by the contractors of twenty-five dollars, as liquidated damages, for every day that the building should remain unfinished beyond that date.

The assignment was not in the nature of a mere order for the payment of a sum of money, but it was of that part of the contract which related to the iron work, and required the assignee to perform this part of the work, and assumed to fix at the sum of $7,700 the compensation for this part, which the assignee should receive from the Commissioners. There is nothing, either in the original contract, or in the evidence introduced at the trial, to show what proportion the iron work bore to the rest of the work requisite for the construction and completion of the jail, or that any separate estimate of the cost or value of the iron work was contemplated by the original contract, or ever made by the defendant, or by any officer or agent of the County."

Meyers & Co. did not assume to pay the subcontractor, but he was to look solely to the commissioners.

The court further states that the subcontract which Meyers & Son made with plaintiff "assumed to compel the commissioners to pay the plaintiff" $7,700, with "no provision for damages for delay, and thus undertook to fix a different measure of compensation from the original contract."

The court further says that its decision is in harmony with, because distinguishable from the cases cited by plaintiff. Some of these cases involved the assignment of a *fund* and not of any *obligation to perform work;* others the assignment of *entire con-*

tracts involving no personal confidence. Referring to the case of *Philadelphia v. Lockhardt,* 73 Pa. 211, 216, the court says that

> "There was no controversy as to the performance of the work, or as to the amount to be paid, but only as to the person entitled to receive payment; the court treating the assignment as one of money only, held the assignee entitled to recover against the city."

In such cases, the court says it was held that mere notice of the assignment, without proof of consent, was held sufficient, but where there was a partial assignment of a contract the consent of the debtor is required, "because 'the policy of the law is against permitting individuals, by their private contracts, to embarrass the financial affairs of a municipality' ". For this reason the court held that the question of consent should have been submitted to the jury.

We find nothing in that case to support the decision of the Circuit Court of Appeals, in the case at bar, that the assignment of a *fund earned* by the contractor is *void,* because made without the consent of the debtor.

Likewise, the statement in the case of *Devlin v. Mayor of N. Y.,* 63 N. Y. 8, quoted by the Circuit Court of Appeals, that

> "Parties may in terms prohibit the assignment of any contract and declare that neither personal representatives nor assignees shall succeed to any rights in virtue of it, or be bound by its obligations",

the reason that Williamson had assigned the contract to the plaintiff without the consent of the board.

One of the contentions of the defendant is stated to be that "both the contract and the assignment of it are invalid, under 'An act to prohibit the assignment and subletting of public contracts' " (Chapter 444, Laws 1897). Section 1 reads:

> "A clause shall be inserted in all specifications or contracts hereafter made or awarded by the state, or by any county, or any municipal corporation, or any public department or official thereof, prohibiting any contractor, to whom any contract shall be let, granted or awarded, as required by law, from assigning, transferring, conveying, subletting or otherwise disposing of the same, or of his right, title or interest therein, or his power to execute such contract to any other person, company or corporation, without the previous consent in writing of the department or official awarding the same."

Section 2 provides that if any such contractor shall, without such assent of the corporation, "assign, transfer, convey, sublet or otherwise dispose of the same, or his right, title or interest therein, or his power to execute such contract, to any other person, company or other corporation," the municipal corporation "shall revoke and annul such contract," and be relieved thereby from all liability and obligation thereunder to the assignee.

The court states:

> "As the complaint alleges that Williamson assigned the contract to the plaintiff corporation, we are not called upon to decide anything

> further in this regard, except that, the assignment being without the consent of the town board, the defendant is 'relieved and discharged from any and all liability and obligations growing out of said contract' to the plaintiff."

The court also states that plaintiff's "only claim is made under a contract originally void, and even that attempted to be illegally assigned, in contravention of the statute."

This case does not consider the effect of the *contract provision* and it does not decide that the assignment is *void*, but merely *that the town is relieved* from liability growing out of the contract, because, firstly, the *contract* was void; and, secondly, because the *assignment* was in *contravention of the statute.*

The case of *City of Omaha v. Standard Oil Co.*, 55 Neb. 337, concerns a contract in which there was a clause prohibiting the assignment of the contract without consent. This case holds that an assignment without consent of moneys *to be earned* under the contract is a violation of such a clause and that the assignee cannot compel the *city* to pay.

The case of *Murphy v. City of Plattsmouth*, 78 Neb. 163, is somewhat similar to the City of Omaha case and follows it.

In all of the above cases cited by the Circuit Court of Appeals, the assignees sought to enforce their claims against the other *party to the contract* who *set up the defense of lack of consent.* And *all* of

these cases concern the *assignment of executory* contracts *before* performance.

The case of *Deffenbaugh v. Foster,* 40 Ind. 382, also referred to, involved merely a point of pleading. The assignee sued to enforce a lien for street improvement, but failed to aver in his complaint the *fact* of *assignment either with or without consent.* The point was raised on demurrer that the title of the plaintiff did not appear. The demurrer was sustained, and the ruling was affirmed on appeal. Any statement of the court on the merits of the case was unnecessary to the decision. In this case the court also stated that the provision was for the *protection of the city and property-owner* against improper and unfaithful substitutes for the original contractor. While this was also dictum it shows that when the court used the word *void,* it did not necessarily mean absolute nullity, since on its view of the case the infirmity was equally available to Foster as a defense whether the assignment was void or voidable.

In this connection we wish to refer briefly to the case of *Butler v. San Francisco Gas & Electric Co.,* cited by the Circuit Court of Appeals (p. 321 Tr.).

The decision in that case, at the time it was used as an authority, was rendered by the District Court of Appeal of California, which *affirmed* the judgment appealed from. The case was afterwards taken to the Supreme Court of California, where the judgment appealed from was *reversed.*

The contract in that case provided that no assignment of the contract should be made by the contractor, nor any portion of the work sublet by him to any subcontractor without the consent of defendant. The contract was sublet to plaintiff without consent and the latter performed the contract. After the work was done the contractor also assigned to plaintiff the money earned but not yet paid. The Superior Court and District Court of Appeal held the subcontract and assignment of money absolutely void. The Supreme Court, on transfer from the District Court, reversed the judgment of the lower court on the ground that the assignment of the moneys earned was not an assignment of the contract. The Supreme Court expressly refused to pass upon the question as to the nature or effect of the subcontract by the contractor to plaintiff on the ground that it was not necessary to the disposal of the case.

Butler v. San Francisco Gas & Electric Co., 168 Cal. 32.

The cases now to be considered are authorities *directly* bearing on the point, and *all of them support the contention of appellant,* that lack of consent does not make the assignment void.

A correct statement of the law is found in *Jones, Pledges and Coll. Securities* (3rd Ed.), p. 143, Sec. 136a, as follows:

> "An assignment by a contractor as security for a debt of all moneys to become due to him from a City, is not rendered void by a provision

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A correct statement of the law is found in *Jones, Pledges and Coll. Securities* (3rd Ed.), p. 143, Sec. 136a, as follows:

> "An assignment by a contractor as security for a debt of all moneys to become due to him from a City, is not rendered void by a provision

> in the contract against assignment, such provision that neither the contract nor any of the moneys payable under it shall be assigned without the consent of the City in writing, is but for the protection of the City and can be availed of only by the City. A junior assignee of the moneys cannot avail himself of the provisions to obtain a more favorable position in the order of payment."

This statement is supported by the following cases:

A case which has been cited with approval in many decisions is that of *Fortunato v. Patten,* 147 N. Y. 277. The facts involved are set forth in 5 Misc. Rep. (N. Y.) 234, and are, shortly, as follows: One Dawson entered into a contract with officials of the City of New York for the performance of some public work. The contract, provided that the contractor would *not assign any of the moneys payable to him,* except with previous consent of the commissioner of public works endorsed thereon, and that *no rights in the contract* or *to the moneys payable thereunder should be asserted* by any assignee whose assignment was not so authorized. The lower court held that an assignment made in violation of this provision was ineffectual as well in law as in equity, as against a subsequent assignment made with consent. These assignments were made *before* the money *was earned* by the contractor. The court said that the case might have been different had the *money been earned before assignment* thereof.

The Court of Appeals of New York, on appeal, reversed the decision of the lower court, and held that the provision against assignment of moneys without the consent of the commissioner *did not make void* an assignment without such consent. It was further held that *Burck v. Taylor,* (152 U. S. 634) had no application to the case before the court.

Hackett v. Campbell, 10 N. Y. App. Div. 523, affirmed in 159 N. Y. 537, involved a provision in a contract between the board of education of the City of Yonkers and a contractor, that *no assignment* of *any portion of the amount due* upon the contract should be made *without the consent* first had in writing, of a committee of the board of education. The contest was between an assignee of moneys due the contractor, to the assignment of which the required consent had not been obtained, and various lien claimants. The court, holding the assignee entitled to priority, says:

> "The appeal is based upon the provision of the contract quoted, the appellants' contention being that it forbids any assignment of moneys earned under the contract and effectually prevents the respondent's order from operating as an equitable assignment. To sustain their contention the appellants cite *Burck v. Taylor* (152 U. S. 634). We think the rule there applied has no application to the case before us. In *Fortunato v. Patten* (147 N. Y. 277) the Court of Appeals of this State decided that a similar provision in a contract with the city of New York was inserted solely for the benefit of the city, and that its sole function was to prevent any claim being asserted against the city in the absence of its consent.

> The court there distinguished between a provision forbidding the assignment of money due under a contract and one forbidding the assignment of the contract itself. The case of *Burck v. Taylor* (supra) was of the latter character. The case before us was of the first. The provision in the contract with Campbell was that no portion of the amount due on the contract should be assigned without the consent of the committee of the board of education, and the case cannot be distinguished in this respect from that of *Fortunato v. Patten.*"

In the case of

Burnett v. Mayor and Aldermen of Jersey City, 31 N. J. Eq. 341,

the facts are almost identical with those in the case before the court. The contract there provided that the contractor should not assign, by power of attorney or otherwise, any of the moneys payable thereunder unless by consent of the board of public works, to be signified by endorsement on the contract, and that for a violation of this provision the board would have power to notify the contractor to discontinue all work, and take the work over into their own hands and complete it at the contractor's expense, the cost to be deducted from the moneys due or to become due to him under his contract.

It was contended in this case that an assignment without consent was of no effect as against subsequent creditors giving notice under the lien law. The court held (pp. 352-353):

> "The assignment was not void, even as against the city, but voidable pro tanto only. The board of works could not deprive the assignees of their right under it. If deemed proper they could protect the interests of the city by taking charge of the work and appropriating the money on hand to its completion. But the city had the clear right to waive the enforcement of a provision in the contract inserted for its special benefit, and did so by omitting to give the required notice to the contractor, and, permitting him to continue the work, as well as by bringing the fund into court and consenting to its distribution."

We wish to call special attention to the language used by the court in this case "The assignment *was not void, even as against the city,* but *voidable pro tanto only.*" For the work performed, the contractor had a right to compensation, and his assignees could not be deprived of their rights thereto. With reference to the portion of the contract yet to be executed by the contractor, the city, if it did not wish to waive the breach of contract, had the right to refuse to proceed with performance on its part upon receiving notice of the breach.

In *Snyder v. City of New York,* 74 N. Y. App. Div. 421, the contract provided that the contractor should not assign "any of the moneys payable under this contract" unless by and with the consent of the commissioner of public works in writing. It was held that the provision was for the benefit of the city. The assignee was permitted to recover from the city.

The case of *Episcopo v. City of New York,* 35 Misc. Rep. N. Y. 623, affirmed in 80 N. Y. App. Div. 627, which was affirmed in 176 N. Y. 572, concerns a contract between Armbust & Co. and the City of New York for the construction of a sewer. Armbust & Co. assigned the contract to Reilly. Reilly borrowed $7,000 from the 12th Ward Bank and gave as security an assignment of "all moneys then due or thereafter to grow due to the extent of $7,000 upon the reserve of 30% provided for in the contract between the City and Armbust & Co." The consent of the commissioner was not obtained to this assignment. The contract provided that the contractor will not assign, by power of attorney or otherwise, any of the moneys payable under this agreement, unless by and with the written consent of the commissioner of street improvements to be endorsed on the contract.

The contract also provided that monthly payments of 70% for the work done should be made to the contractor. These payments not having been made when due, the contractor notified the city that he would be unable to proceed with the work if the payments then due were not made on the 25th of the month. The commissioner of the sewers refused to make any further payments and declared the contract abandoned.

At the time of the declaration of the abandonment of the contract, the contractor had earned $31,824. of which he had received $15,640.

The contest was between the bank and various lien claimants. The lack of consent to the bank's assignment was urged against its claim. In passing upon this point the court, page 632, states:

> "The fact of this omission if properly pleaded would undoubtedly serve as a defense to the city to any claim made against it by an assignee of the contract, but here the claim of the bank is not made against the city, but against the 30% reserve payable under the contract. If these funds do not belong to the city, as has been held, it is a matter of no concern to it what parties are entitled to receive them.
>
> More than this, the city has not put itself in a position to avail itself of this clause in the contract because of its failure to plead it as a defense in its answer. Burke v. Mayor, 7 App. Div. 128.
>
> Neither can this clause serve as a defense to the various parties claiming liens, for the reason that its sole purpose is for the protection of the city and not of outside parties. That lienors cannot avail themselves of such a clause was decided in the case of Fortunato v. Patten."

Judgment was rendered for the bank.

In the case of *Staples v. City of Somerville,* 176 Mass. 237, the contract was assigned without the consent of the city, thereby violating a provision in the contract requiring written consent. The assignee, plaintiff in the suit, claimed $4000 which was held up by the city because of conflicting claims, but which the city stood ready to pay to the person entitled thereto. The court held that it *was immaterial that the city did not consent*: that plaintiff

had an equitable right to the money, although the *city could have refused to deal with him.*

In the case of *Board of Trustees v. Whalen,* 17 Mont. 1, the court, speaking of a clause prohibiting the assignment of a contract without the written consent of trustees or architect, says:

> "This clause was inserted for the protection of the trustees. They have interposed no objections to these assignments. It does not lie in the mouth of Whalen and Grant to repudiate these assignments after having obtained thereby the Bank's money to enable them to carry out their contract with the trustees; and as appellants stand in the shoes of Whalen and Grant, it is difficult to see how they can assert rights and defenses against the bank that are not allowable to Whalen and Grant."

The above suit was brought by the trustees against the contractors, the bank, and various creditors of the contractors to determine their respective rights to a fund. The bank claimed under an assignment made without consent, and some of the defendants had garnished the trustees for debts due from the contractors. On the facts, the case is very similar to the case at bar, and is direct authority on the point that the provision forbidding assignment without consent is for the *benefit of the one whose consent is required, and no other person can interpose the objection.*

Dillon on Municipal Corporations (Fifth Edition Vol. 2, page 1282), after referring to like prohibitions in statutes, states:

> "Similar conditions govern the effect of a clause in a contract prohibiting the assignment thereof and providing for a forfeiture thereof in the event of its being assigned. Such a clause, forming a part of the contract, has the force of law over those who are parties to the contract. But this provision is inserted in the contract *solely for the benefit of the city* and prevents any claim being asserted against it in the absence of its consent. It is a shield to protect the city and is not intended for the benefit of persons with whom the contractor may deal."

Neither the board of public works nor the City and County of San Francisco, nor any officer, agent nor department thereof, has or asserts any claim to the fourth progressive payment, by either claiming the warrant therefor, or the proceeds of said warrant, declared to have been earned by and payable to the contractor, *before* it was assigned to the Portuguese-American Bank, appellee herein, as part security for $35,000.00 then loaned by the appellee to the contractor.

(1) Paragraph VII of the amended bill of complaint (p. 12 Tr.) expressly declares:

> "* * * that neither said Thomas F. Boyle individually or as Auditor of said City and County of San Francisco, or said City and County of San Francisco, nor any officer, agent or department thereof has or asserts any claim whatever upon said demand or to said sum of six thousand eight hundred thirty and eighty-five one hundredths ($6,830.85) dollars, or any part thereof, nor any offset nor counterclaim thereto; and that the sole and only reason why said demand, and its proceeds, said six

thousand eight hundred thirty and eighty-five one hundredths ($6,830.85) dollars, is not immediately delivered by defendant Boyle to said defendant trustee is that there exists some doubt in the mind of defendant Boyle as to whether said trustee or complainant or said defendant bank is the one rightfully entitled thereto."

And paragraph IX of said bill of complaint (p. 15 Tr.) expressly states:

"That no person, firm nor corporation has or asserts any claim, right or offset or counterclaim whatever to said demands or moneys, or any part thereof, save only complainant, said Trustee defendant and Portuguese-American Bank of San Francisco, defendants herein."

(2) The amended return to the order to show cause and answer of Auditor Boyle (p. 67 Tr.) expressly declares:

"* * * and that the City and County of San Francisco makes no claim to said warrant, or demand, or any of the proceeds thereof, nor does this defendant make any such claims, and this defendant is merely a stakeholder."

(3) The answer of appellant John Daniel, trustee (p. 79 Tr.), expressly admits each and every allegation of paragraphs VII and IX of the bill of complaint as amended.

(4) The report of the referee (p. 147 Tr.) contains this finding:

"The Auditor makes no claim on his own account or on account of the city to the demand in controversy, and the city makes no claim thereto."

(5) Mandamus and injunction of the District Court ordered the auditor to allow, approve and deliver to the defendant John Daniel, as trustee, to abide the result of the action, the proceeds to be distributed to whomsoever shall be lawfully entitled (pp. 115-116 Tr.).

This is a complete waiver by the city: the waiver of the breach of any covenant or condition by the contractor is involved by necessary implication in the express declaration by the auditor that neither he nor the city makes any claim to the fourth progress payment.

The facts square with those of *Burnett v. Mayor and Aldermen of Jersey City*, supra:

> "But the city had the clear right to waive the enforcement of a provision in the contract inserted for its special benefit, and did so by omitting to give the required notice to the contractor, and permitting him to continue the work, as well as by bringing the fund into court and consenting to its distribution" (pp. 352-353).

Provisions prohibiting assignment without consent are frequently found, also, in contracts of lease, insurance and sale; and the courts have held that assignments in violation of such provisions are not void, but that such provisions are solely for the benefit of the parties whose consent is required.

In the case of *Randol v. Tatum*, 98 Cal. 390, a lease contained a covenant to the effect that the lessee would not assign without the written consent

of the lessor: also, a condition that if default were made the lessor might re-enter. Referring to an assignment made without consent, the court says:

> "The lessor did not have the option of declaring the assignment void, but it was his privilege, if he desired to avail himself of it, to avoid the lease and end the term; that is if the condition continued after the first assignment" (p. 396).

In the case of *Webster v. Nichols,* 104 Ill. 160, the court holds such an assignment valid, and says:

> "The clause in the lease providing that the premises shall not be assigned without the written consent of the lessors, is clearly for the benefit of the lessors only. It does not render the assignment when otherwise made absolutely void, but voidable only at the option of the lessors or their representatives."

The language here used is criticized in the case of *Randol v. Tatum,* supra, as being too strong. The Supreme Court of California, in this respect, says (p. 398):

> "Although in that case the court uses the expression that the landlord has the option to avoid the assignment, the whole quotation shows that the meaning is that the landlord may end the term. The question was whether the assignment was valid. The landlord not only refused to consent to the assignment, but refused to recognize the assignees as her tenants, and received rent from them only as subtenants."

In the case of *Den v. Post,* 1 Dutch. 289, the landlord took possession on the assignment by the tenant in violation of a covenant not to assign

without consent, on the ground that the assignment was void. It was held that the assignee was entitled to the possession as against the *landlord,* because the lease did not provide for re-entry, and that "neither the lease nor the assignment is avoided by reason of the breach of covenant".

In the case of *Hague v. Ahrens,* 53 Fed. Rep. 58, the United States Circuit Court of Appeals, 3rd Circuit, held, where the lease provided that it could not be sold, assigned or transferred without the written consent of the party of the first part, that the lease would pass by an assignment without the lessor's consent, and that the assignee could maintain ejectment under it against a person placed in possession by the landlord.

In re Pennewell, Circuit Court of Appeals, Sixth Circuit, 119 Fed. 139, at page 141, it is stated:

> "The authorities, English and American, cited in 18 Am. & Eng. Enc. Law, 369, fully sustain the statement there made that:
>
> 'The common-law rule is well settled that a breach by the lessee of his covenants or agreements in the lease does not work a forfeiture of the term in the absence of an express stipulation in the lease or the reservation of a power of re-entry in case of such breach. The general remedy of the lessor in such a case is merely by action for the recovery of damages. This rule applies with regard to implied covenants; express covenants to pay rent; covenants to pay taxes; covenants not to assign or sublet.'"

> "Restrictions against assignments or subleases, whether imposed by statute or the terms of the lease, are intended for the benefit of

> the lessor and his assigns, and if neither of these object to a breach of the restriction no one else may do so."
>
> *24 Cyc.* 968.

A consideration of these cases, and especially of the California case referred to, shows the rule to be, that a provision in a lease that the lessee shall not assign without the consent of the lessor *does not avoid* an assignment made without such consent. That such an assignment is *valid* and will pass the term; but that if the right of re-entry is reserved for breach of this provision, then the lessor may defeat the interest of the assignee, *not by avoiding the lease or the assignment,* but by exercising his right to *end the term.*

There is certainly no reason why a stricter rule should be applied to contracts, such as the one under consideration. *The question of the assignment of a lease is surely as important to the landowner as that of the assignment of money under a sewer contract is to the city.*

This same construction has been given to provisions in insurance policies requiring the consent of the company to the assignment of the policy, or the property covered by it.

> "Even though the policy contains the usual clause providing that it shall be void if assigned without the consent of the insurer, this is for the benefit of the insurer alone, and if he does not object to the assignment other parties will not be permitted to do so."
>
> *13 A. & E. Encycl. of L.,* 2nd Ed. page 186, citing *Lienkauf v. Calman,* 110 N. Y. 50.

"This clause (condition against assignment) is for the insurer's benefit, and may of course be waived by it, and where such assignment is made the policy is not avoided, but is merely rendered liable to forfeiture."

13 A. & E. Encycl. of L., 2nd Ed. 194, citing *Illinois F. Ins. v. Stanton,* 57 Ill. 354; *Hyatt v. Wait,* 37 Barb. (N. Y.) 29; *Benninghoff v. Agricultural Ins. Co.,* 93 N. Y. 495.

The same construction has been placed upon covenants restricting the assignment of contracts of sale.

In *Wilson v. Reuter,* 29 Ia. 176, the court held that if a mortgage could be regarded as an assignment within the meaning of a contract of purchase, which required the consent of the seller to an assignment thereof, the stipulation was for the *benefit of the seller,* and that he alone could insist upon its enforcement. Defendants did not *succeed to his rights.*

In the case of *Sproull v. Miles,* 82 Ark. 455, which involved the question of assignability of a contract of sale, the court held that where the contract provided that it should not be assigned without the consent of the vendor, and the contract was assigned in violation of the provision, the assignee could *specifically enforce the assignment* against the original vendee.

In *Grigg v. Landis,* 21 N. J. Eq., 494, a contract of sale stipulated that it could not be assigned

without the consent of the vendor prior to the payment of certain installments and making of certain improvements. The contract was assigned in violation of this provision, and the assignee upon performance was allowed to *specifically enforce* the agreement against the *original vendor.*

The Circuit Court of Appeals has intimated that the purpose of this provision of the contract was to protect laborers and materialmen (Opinion, p. 318 Tr.).

We submit that the court cannot read into the contract or the law something which is not there.

Dillon, Municipal Corporations, 5th Edition, Section 831, says:

> "In the *absence of statutory provision* imposing a duty upon a municipality to protect the claims of sub-contractors, materialmen and laborers, a city usually owes them no duty. *Stipulations of the contract* requiring the contractor to pay for all labor and material are, as a general rule, deemed to be made by the city for its own protection, and not for the benefit of third parties, and do not confer any cause of action against the city in favor of sub-contractors, materialmen, or laborers."

A fortiori, the clause forbidding assignment of moneys, cannot be construed as a provision for the protection or benefit of third parties.

Dillon on Municipal Corporations, 5th Edition, Section 832, states:

> "A contract with a municipality to furnish material and perform labor in and about an improvement is, on the question of its assign-

ability, *subject to the same general principles as contracts between individuals.*"

To permit the operation of covenants or conditions restraining the alienation, unless with consent of the city authorities, of moneys earned by the contractor and which have been ordered paid, would be to place in the hands of such authorities power to crush the most responsible and conscientious men on grounds of personal or political ill will.

There are strong reasons in this case supporting just the opposite view from that taken by the Circuit Court of Appeals, on the question of the probable motives of the board of public works in placing this provision in the contract, if, indeed, it is at all proper to *speculate* as to their motives.

In the first place, neither the laws of California, nor the Charter of San Francisco, require or permit the city, or any department thereof, to insert such provisions in contracts for the protection of materialmen, laborers or subcontractors. In the second place, these persons are amply protected by the law.

Under Section 1184 of the Code of Civil Procedure of the State of California (see p. 12 of brief) these persons may give notice to the owner *when they first enter upon the work, at any time during the progress of the work,* and until money falls due to the contractor and he *parts with his right thereto.* Judge Dietrich, in his opinion in this case, speaking of the rights of appellee Welles, says:

"But it appears that under the law he might have fully protected himself against the assign-

ment to the bank and all other contingencies, by giving the notice to withhold when he first entered upon the work."

Furthermore, these persons are amply protected by the bond required of contractors on municipal work under Act 2895 of the General Laws of California. Section 1 of this act is as follows:

"ACT 2895.

An act to secure the payment of the claims of materialmen, mechanics, or laborers, employed by contractors upon state, municipal, or other public work.

(Approved March 27, 1897. Stats. 1897, p. 201.)

Every contractor, person, company, or corporation, to whom is awarded a contract for the execution or performance of any building, excavating, or other mechanical work, for this state, or by any county, city and county, city, town, or district therein, shall, before entering upon the performance of such work, file with the commissioners, managers, trustees, officers, board of supervisors, board of trustees, common council, or other body by whom such contract was awarded, a good and sufficient bond, to be approved by such contracting body, officers, or board, in a sum not less than one-half of the total amount payable by the terms of the contract; such bond shall be executed by the contractor, and at least two sureties, in an amount not less than the sum specified in the bond, and must provide that if the contract, person, company, or corporation, fails to pay for any materials or supplies furnished for the performance of the work contracted to be done, or for any work or labor done thereon of any kind, that the sureties will pay the same in an amount not exceeding the sum specified in the bond; provided, that such claims shall be filed as hereafter required."

That a bond was given under this act by the Metropolis Construction Company, the contractor in this case, appears from "Exhibit C", attached to the bill of complaint of Paul I. Welles:

> "And that said City and County of San Francisco, * * * by and through the Board of Public Works * * * did, to wit: on July 22d, 1910, duly accept the bond of said Metropolis Construction Co., a corporation, as principal, and the Empire State Surety Co., of New York, a corporation, as surety, in the sum of seventeen thousand ($17,000) dollars, as provided by an 'Act to Secure the Payment of the Claims of Materialmen, Mechanics, or Laborers, Employed by Contractors upon State, Municipal, or other Public Work', approved March 27th, 1897 * * * " (pp. 38-39 Tr.).

Municipal corporations do not possess and cannot exercise any powers other than those expressly granted, necessarily implied in or incidental to those expressly granted, or indispensable to the objects and purposes of the corporation.

Dillon on Municipal Corporations, 5th Ed., Sec. 237;

Leslie v. Kite, 192 Pa. St. 268.

Municipal authorities have no power to provide a new remedy by lien or attachment or trust of any kind whereby subcontractors may enforce payment of their claims. The legislature of California has provided a remedy for this purpose, by giving subcontractors on public work, in addition to the bond mentioned, the right to notify the owner to withhold money due or to become due to the

principal contractor at any time from the *commencement* of the subcontract until the principal contractor has earned a payment and parted with his right to receive it. The municipal authorities are without power to enlarge this right by preventing a contractor from assigning moneys after they are earned so as to extend the time within which subcontractors may file their notices to withhold.

Leslie v. Kite, 192 Pa. St. 268, 274.

Appellee Welles has no equities as against appellant, and the District Court so found. Mr. Welles entered into an agreement with the contractor to do certain work for *90 per cent of the moneys to be received by the company from the city.* To this subcontract there was no consent of the city as required by the contract (p. 137 Tr.), nor was a copy of the contract for subletting filed with the board of public works as required by the contract (p. 136 Tr.). Mr. Welles negligently omitted to give the notice under Section 1184, when he first entered upon the work or at any time prior to the earning of the payment by the contractor. In a word, Mr. Welles took no steps to protect himself. When the bank made its loan the security offered had been earned, notice of the assignment was in the hands of the auditor, and the records disclosed no claims standing against the funds.

The bank can only look to its assignment for reimbursement. Mr. Welles has a $17,000 surety company bond for his protection (pp. 32-33 Tr.).

While it is true that but $6830 is directly involved in this particular case, the balance of the $38,171 warrants mentioned in the order on the auditor (p. 97 Tr.) *indirectly* depends upon the final judgment herein.

While the record shows that Welles did the work it does not disclose what disposition the Metropolis Construction Company made of the moneys advanced by the bank, any evidence of which would have been inadmissible under the issues, as the bank rested its claim upon an assignment.

Because the record is silent as to this it cannot be inferred that Mr. Welles *did not* receive any of the bank's money.

B.

MONEYS EARNED BY THE CONTRACTOR IN PERFORMANCE OF ITS CONTRACT, AND ORDERED PAID TO IT BY THE BOARD OF PUBLIC WORKS, CONSTITUTE A DEBT DUE FROM THE CITY TO THE CONTRACTOR WHICH IS RIGHTFULLY THE SUBJECT OF FREE ALIENATION; AND IF THE EFFECT OF THE PROVISION IN THE CONTRACT, THAT THE CONTRACTOR "SHALL NOT, EITHER LEGALLY OR EQUITABLY, ASSIGN ANY OF THE MONEYS PAYABLE UNDER THIS CONTRACT OR HIS CLAIM THERETO UNLESS WITH THE LIKE CONSENT OF THE BOARD OF PUBLIC WORKS," IS TO RESTRICT THE FREEDOM OF ALIENATION OF CHOSES IN ACTION, IT IS TO THAT EXTENT VOID AS CONTRAVENING PUBLIC POLICY AND THE STATUTES OF THE STATE OF CALIFORNIA.

The Circuit Court of Appeals has held (p. 316 Tr.), that if the assignment to the appellant by

Metropolis Construction Company, the contractor, was not void for lack of consent thereto by the board of public works, then its equities were superior to those of appellee Welles, for the reason that when the board of public works approved the claims for the work done and directed payment, the right of the contractor to immediate payment became vested in it and was subject to its disposition (following *Newport Wharf & Lumber Co. v. Drew,* 125 Cal. 585).

But the court further held (p. 316 Tr.) that the provision of the contract, that the contractor should not assign moneys payable under it or his claim thereto without the consent of the board, destroyed the right of disposition and made the assignment to appellant void. In so ruling, the Circuit Court of Appeals fell into error. The court should have decided that if this provision attempted to restrict the assignment of the money of the contractor, *earned* by it under the contract and directed to be paid, it was null and void, because intended to prevent the assignment of a chose in action contrary to the policy of the law and the statutes and decisions of the State of California.

In California a chose in action, by virtue of statutory enactments, stands upon the same footing, with respect to transferability, as any other property.

Section 954 of the Civil Code of California provides:

"A thing in action arising out of the violation of a right of property or out of an obligation may be transferred by the owner. * * *"

Section 711 of the same code provides:

"Conditions restraining alienation, when repugnant to the interest created, are void."

The rule is stated in *Meech v. Stoner,* 19 N. Y. 26, at page 29, and approved in *Rued v. Cooper,* 109 Cal., p. 693, as follows:

"Assignability of choses in action is now the rule; non-assignability, the exception; and this exception is confined to wrongs done to the person, the reputation or the feelings of the injured party, and to contracts of a purely personal nature, like promises of marriage."

The Supreme Court of California has decided that Section 711 of the Civil Code, above set forth, is merely declaratory of the common law.

Murray v. Green, 64 Cal. p. 366.

The principle of the common law was this:

Where no reversionary interest in real or personal property was retained by the grantor, any attempted restraint on alienation by the grantee was void. The question involved in an early English case was whether or not the restraint on alienation of certain *bank stock* given to a person and his heirs was void, and in passing on the point Arden, M. R., says:

"I have looked into the cases that have been mentioned, and find it laid down as a rule long ago established, that where there is a gift

> with a condition inconsistent with and repugnant to such gift, the condition is wholly void."
>
> *Bradley v. Peixotto,* 3 Ves. Jr. 324.

Lest it might be contended that the covenant or condition of the contract in the case at bar is not such as would be held repugnant to a vested title with right of disposition, we will refer to the case of *Murray v. Green,* 64 Cal. 363, where the condition that the grantee should not alien *without the consent of the grantor,* was held void. The court (p. 367) says:

> "It is difficult to conceive of a condition more clearly repugnant to the interest created by a grant of an estate in fee simple than the condition that the grantee shall not alien the same without the consent of the grantor."

Likewise, where property was conveyed to a party who thereafter entered into a contract with her son not to convey the same without the latter's consent, the court held that the agreement was void as a restraint on alienation, and as obnoxious to the policy of the law.

Prey v. Stanley, 110 Cal. pp. 426-427.

This same rule is applicable to choses in action.

In the case of *Alkan v. The N. H. Ins. Co.,* 53 Wis. 136, an insurance policy declared that it should be *void* if assigned "either before or after loss". The court, pages 145, 146, says:

> "The assignment of the policy in form was in substance and effect an assignment of the debt which the insurer owed the insured. One

of the incidents of ownership of a chose in action of this kind, arising *ex contractu,* is an absolute right to assign or transfer it. It is an elementary rule of law, that a condition or exception in a gift or grant, inconsistent with or repugnant to the nature of the estate given or granted, is void and must be rejected * * *

In Bradley v. Peixotto, 3 Ves. Jr. 324, the master of the rolls applied the above rule to a gift of bank stock, with condition that it should be forfeited if the donee should dispose of it, and held the condition inconsistent with the gift, and therefore void. No good reason is perceived why the rule is not, on principle, equally applicable to covenants and contracts. If it is, then it seems very clear that a condition in a policy of insurance that an assignment after loss, * * * shall forfeit the contract and invalidate the policy is in like manner void. For certainly such a condition is entirely inconsistent with the contract of indemnity, after the liability of the insured has become absolute, and only the ordinary relation of debtor and creditor exists between the insurer and assured."

In the case of *Spare v. Home Mutual Ins. Co.,* 17 Fed. Rep. 568 (U. S. Cir. Ct. Oregon), the rule is stated as follows:

"But the stipulation that the policy shall be void if so assigned (without consent) after the fire, stands on a different footing. When the proof of loss was made, and the liability of the defendant under the policy fixed, the relation between the parties was changed from insurer and insured to that of debtor and creditor, and the *delectus personae* of the contract was no longer material. Therefore, this second stipulation is null and void because it

> is intended to prevent the assignment of a chose in action contrary to the policy of the law."

The policy in that case provided "if the policy is assigned before or after a fire the same shall be void".

It is to be noted that these provisions are much stronger than that in the case at bar. Here we have no condition or covenant declaring that an assignment without consent *shall be void.*

In the case of *Courtney v. The N. Y. City Ins. Co.,* 28 Barb. (N. Y.) 116, in declaring void a like condition, the court says, page 118:

> "If the purpose of the 4th condition, or one of its purposes is to prevent a sale and assignment of the debt after it had accrued and the right to it become perfect, I very much doubt whether such a condition is valid or can be enforced, for the reason that it is repugnant to the principal object of the contract. Whenever the right of property in the debt or damages attaches and becomes perfect, all the incidents of property attach also, including the power of sale and disposition. Now this power of sale and disposition is inseparable from the absolute right of property, and any condition of the kind attached to the sale of real or personal property, when there is no reverter or reversionary estate in the vendor, is repugnant and absolutely void."

Likewise, the case of *Roger Williams Ins. Co. v. Carrington,* 43 Mich. 252, the court declared that a provision forfeiting the policy for an assignment *without the company's consent,* was void, so far

as it applied to a claim against the company. The court says:

> "The provision of the policy forfeiting it for an assignment without the company's consent is invalid, so far as it applies to the transfer of an accrued cause of action. It is the absolute right of every person—secured in this State by statute—to assign such claims and such a right cannot be thus prevented. It cannot concern the debtor, and it is against public policy."

In the case of *Maryland Casualty Co. v. Omaha Electric Light & Power Co.*, 157 Fed. Rep. 514 (Circuit Court of Appeals, Eighth Circuit), the court held that provisions in an employer's insurance policy prohibiting assignment without the company's consent, and restricting the right of action for a loss to the assured, did not apply after the company's liability had become fixed. The court declares that it is settled by the great weight of authority that such liability, "like any other chose in action was assignable regardless of the conditions of the contract in question." The court cites the case last above mentioned, with others, to support its decision.

In the case of *Goit v. National Protection Ins. Co.*, 25 Barb. (N. Y.) 189, the provision against assignment was in these words:

> "that in case of assignment without consent of the company first obtained, in writing, whether of the whole policy or of any interest in it, or of any claim against said company by virtue thereof, either prior *or subsequent to loss or damage* of the property or premises

> insured thereby, the liability of the company in virtue of such policy should thenceforth cease."

In its opinion, the court says (p. 195):

> "I am of the opinion that the contract of insurance proper terminated with the loss, and an absolute debt then upon furnishing the proofs by the insured, accrued against the company and that the provisions relied upon ought not to be allowed to defeat this absolute claim."

In the case of *West Branch Ins. Co. v. Helfenstein,* 40 Pa. St. 289 (80 Am. Dec. 573), the policy provided that *neither it nor any claim* under it could be assigned *before or after loss* without the consent of the company. That an assignment without consent would render policy void and that liability of corporation upon such claim would cease. The court held (p. 300) that the condition was *null and void* because opposed to the law of the land.

In the case of *Pennebaker v. Tomlinson,* 1 Tenn. Ch. 598, it was held that a stipulation against assignment after loss without consent would be void as against public policy.

The case of *Carroll v. Charter Oak Ins. Co.,* 38 Barb. 402, affirmed in 1 Abb. App. Dec. 316, cites *Courtney v. The N. Y. City Ins. Co.,* supra, and *Goit v. National Protection Ins. Co.,* supra, with approval.

It is stated (p. 409) in the decision:

> "Even if the policy had contained a provision prohibiting a transfer of the interest

> of the insured *after* loss, it seems that according to the weight of authority, the provision would have been illegal and void."

See also *Wood on Fire Insurance,* 2nd Edition, page 758, to same effect.

The rule cannot be more aptly expressed than in the language of *13 A. & E. Enc. Law,* 2nd Edition 201:

> "Such an assignment * * * is valid even though the policy stipulates that it shall be void if assigned without consent before or after loss, for such a prohibition is against public policy and is invalid because it is intended to prevent the assignment of choses in action."

We can conceive of no reason why this rule of law should not be held generally applicable to all contracts.

In *Snyder v. City of New York,* 74 N. Y. App. Div. 421, the court held the principle of the insurance cases applicable to public contracts.

In that case a contract for public improvements provided that the contractor should not assign "any of the moneys payable under this contract" unless by and with consent of the commission of public works in writing. After the contractor became entitled to a progress payment the city cancelled the contract.

A claim for moneys *earned* under the contract was assigned by the contractor to plaintiff without such consent. The first point made by the city was that no cause of action vested in plaintiff as

against defendant city, as there could be no assignment without consent.

The court held that the contractor was entitled to receive moneys earned and that

> "An assignment of these claims would not be an assignment of the contract, but of a cause of action against the city for the recovery of moneys which it was obligated to pay and in this view of the question there would be no violation of the clause of the contract which prohibited its assignment without the consent of the commissioner of public works. The clause in question is a restriction solely upon the assignment of the contract as such and not of moneys earned thereunder and which the city is bound to pay" (p. 426).

But despite the provisions in the contract prohibiting the assignment thereof or of moneys payable under it, without the commissioner's consent, plaintiff was allowed to recover against the *city*.

The court said:

> "It also appeared that the assignment was not made until the work had been completed by another, so that at the time when the assignment was made there was no contract in existence to assign, consequently the city could not be deprived of the services of the particular contractor. There was nothing, therefore, in existence to assign except the claim against the City. Defendant could resist payment only by showing either actual fraud, collusion or mistake."

The case of *Mellen v. Hampshire Ins. Co.*, 17 N. Y. 609, cited by the court in the above case,

fully supports this view. A policy of insurance prohibited a transfer thereof without the consent of the insurer. After loss suffered the insured assigned the policy. The court held that the restriction was upon assignment during the pendency of the risk, and not upon the transfer of the debt arising from a loss.

This is exactly the situation in the case at bar. Upon the estimate of the engineer and approval by the board of public works, a certain amount of money became due from the city to the contractor, as was found by the Circuit Court of Appeals. The demand in question was not payable *under the contract,* when the assignment was made to the appellant, but was payable under the obligation fixed by the city officials. The city had its work done by its contractor: it enjoyed the fruits of his financial interest in the work. The contract was, in respect to monthly estimates, severable, and the portion represented in the fourth progressive payment was completed and accepted by the board of public works. Nothing remained but for the city to pay the contractor. It is well settled that assumpsit would lie to enforce payment of the city's indebtedness.

> "While a special contract remains executory the plaintiff must sue upon it. When it has been fully executed according to its terms and nothing remains to be done but the payment

> of the price, he may sue on the contract, or in *indebitatus assumpsit,* and rely upon the common counts. In either case the contract will determine the rights of the parties."
>
> *Dermott v. Jones,* 2 Wall. (U. S.) 1;
>
> *2 Encyc. Pl. & Pr.,* page 1009, and cases cited.

In the case of *Episcopo v. City of New York,* 35 Misc. Rep. N. Y., affirmed in 176 N. Y. 572, hereinbefore cited, the court held that an assignment of moneys earned by the contractor in violation of a provision against assignment of moneys payable under the contract, was a matter of no concern to the city. In that case the assignment to the bank was of a portion of the reserve of 30% of moneys earned by the contractor provided for in the contract.

In speaking of this claim the court, page 632, states that

> "the claim of the bank is not made against the city, but against the 30% reserve payable under the contract. If these funds do not belong to the city, as has been held, it is a matter of no concern to it what parties are entitled to receive them."

We, therefore, contend that the provision of the contract restricting the assignment of moneys payable under the contract, or the contractor's claim thereto, cannot be reasonably construed to apply to money which has been ordered paid to the contractor *prior to its assignment.* While it may be said that the money arose out of the performance

of the contract, still it *is not payable under the contract,* but is payable under the order of the board of works. The transaction in question was in effect an accounting between the city and its contractor as the work progressed. The claim is no longer on the contract, but is on the account stated between them, and cannot be resisted except for fraud, collusion or mistake.

While it is no more necessary in this case than it was in *Snyder v. City of New York* to hold that the provision of the contract requiring consent applies to *money already earned* by the contractor, still, if it were necessary to so hold, then under the authorities such provision, as far as it attempts to restrain the assignment of *debts* due from the city to the contractor, would be void as against public policy.

There is no authority to be found which sustains the right of the board of public works to restrain by covenant or condition, the alienation of moneys by the contractor *after* the right to them had "vested": *after* the board had decided that the *conditions of the contract had been fulfilled,* and *after* the board *had approved the claims for the work done and had directed payment of the same.*

C.

IT APPEARS FROM THE CONTRACT IN THIS CASE THAT IT WAS NOT THE INTENTION OF THE PARTIES THAT AN ASSIGNMENT OF MONEYS EARNED BY THE CONTRACTOR AND ORDERED PAID TO IT BY THE BOARD OF PUBLIC WORKS SHOULD BE VOID IF MADE IN VIOLATION OF THE PROVISION THAT "HE SHALL NOT, EITHER LEGALLY OR EQUITABLY, ASSIGN ANY OF THE MONEYS PAYABLE UNDER THIS CONTRACT OR HIS CLAIM THERETO UNLESS WITH THE LIKE CONSENT OF THE BOARD OF PUBLIC WORKS".

Taking up this point, we desire to call attention to the fact that the Circuit Court of Appeals held (pp. 315-316 Tr.) that the fourth progress payment *became due* to the contractor from the City of San Francisco *when* the board of public works *approved* the *estimate of the city engineer and directed its payment.* When the board of public works authorized the payment of $6830.85 by the city to the contractor the obligation of the city which had been created in favor of the contractor by the board of public works became complete, and the right of the contractor to immediate payment became vested in it and was subject to its disposition (pp. 315-316 Tr.), following *Newport Wharf & Lumber Co. v. Drew,* 125 Cal. 585. Thereupon the contractor presented its demand for this fourth progress payment, had the same approved by the board of public works, and assigned it, with two others, to appellant for a present consideration of $35,000.00 (pp. 141-142 Tr.). Appellant parted with its money on the faith

of the assignment, and any covenant or condition in the contract between Metropolis Construction Company and the board of public works bearing on the contractor's right to alienate its own property should be given a construction favorable to alienation, and not a construction which would defeat the rights of appellant.

There is no provision in the contract that an assignment without consent shall be *void,* or that it will *ipso facto* terminate any rights under the contract, nor is there any provision in it showing what will be the effect of a breach of a provision, condition or covenant except the following taken from the same "General Provisions" of the specifications annexed to the contract, that contains the provision that the contractor shall not assign any moneys without consent (p. 306 Tr.):

> "TERMINATION OF CONTRACT: All conditions of this contract are considered material and failure to comply with any of said conditions on the part of the contractor shall be deemed a breach of the contract.
>
> Should the contractor neglect or fail to perform any of the conditions of the contract, the Board of Public Works shall have the right, whether any alternative right is provided or not, to declare the contract terminated.
>
> The passage of a resolution by the Board of Public Works stating that the contract is terminated and the service of a copy of said resolution upon the contractor shall be deemed a complete termination of the contract."

Appellant contends that this provision and that relating to assignment of moneys must be read

together to determine the intention of the parties to the contract. From them it is evident that the neglect of the contractor to obtain consent was merely the breach of a covenant for which the board of public works *might* by resolution terminate the contract, or it was the breach of contract for which an action for damages will lie. In either case the assignment will be *good and enforceable* and *vest title* in the assignee.

The provision that the contractor "shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the Board of Public Works," is followed in the same portion of the contract by the provisions entitled "Termination of Contract".

It is apparent, therefore, that the contract was drawn up with due consideration of the penalties which breaches would entail. For failure of the contractor to comply with any of its conditions, "the Board of Public Works shall have the *right*, whether any alternative right is provided or not, to declare the contract terminated". No alternative rights are provided. Any other rights which the board of public works may have are general contract rights. The provision relating to termination of contract consists of two parts: one declaring that a "*failure to comply*" with any of its conditions "shall be deemed a *breach* of the contract"; and the other, that if the contractor should "*neglect or fail to perform* any of the conditions of the

contract" the board may "declare the contract terminated".

It is clear that the board of public works had in mind the possible violation of the agreement and undertook to provide against such a contingency.

Yet there is no provision of the contract which is directly operative upon dealings between the contractor and third parties, in violation of its terms. It is not declared that such dealings shall be void, or of no effect, or that no rights shall be acquired thereby. The only declaration is that a *failure to comply* with the conditions shall be deemed a *breach of contract,* or at most may give the board of public works the privilege of declaring the *contract terminated.* In the latter case, if the assignee's rights depended upon the performance of the contract, a termination of the contract *would not* make the assignment *void,* but would end the rights of the contractor. The remedy is solely against the *contractor.*

A like provision was considered by the Circuit Court of Appeals for the third circuit in the case of *Hague v. Ahrens,* 53 Fed. 58, and that court reached a different conclusion from that in the case at bar. That case concerned a lease which contained a clause: "This lease not to be sold, assigned or transferred without the written consent of the party of the first party."

The lease was assigned without consent of the lessor. The assignees after a short occupation of the land apparently abandoned it. Some months

after this the landlord made another lease to Hague, who entered into possession and rendered the land profitable.

Thereafter, the assignee assigned the lease to Ahrens, who brought an action in ejectment against Hague to recover possession of the premises, and was awarded judgment, which was affirmed.

Defendant contended that the lease was not assignable without consent and that the clause in the lease was a "limitation".

In discussing this the court states:

> "The court treated the clause of the lease (recited in the first assignment) as a covenant, simply. The plaintiff urged and still urges that it is a 'limitation.' By this term he must be understood to mean a condition subsequent, or a conditional limitation; as applied it can have no other signification. Was the court right? A condition subsequent is a contingency named, on the happening of which a grant may be defeated,—such as the failure to pay money, erect buildings, or do any other required act, the failure to do which authorizes the grantor's re-entry. A conditional limitation—an example of which is a grant to one so long as he occupies the premises, or to a widow during widowhood—differs from it only in form, and the fact that re-entry is not necessary to terminate the grant. The law regards conditions with the same disfavor it does forfeitures; and for similar reasons. A clause will not therefore be treated as a condition if it can be construed a covenant without violence to its terms. If the purpose to create a condition, or conditional limitation, is not expressed in clear, unequivocal language—as the courts have frequently said in 'apt terms', such as 'upon condition', 'pro-

vided nevertheless', 'so long as,' 'during,' etc.—the clause will be treated as a covenant, simply. The provision under consideration does not contain such language. The terms, 'this lease shall not be sold, assigned, or transferred, without the written consent of the party of the first part,' convey no suggestion even that the lease may be lost by such transfer. They express simply an agreement by the lessee, who alone could make the transfer, that he will not do it. If the lessor was not satisfied with the remedy which the law affords for breaches of such agreements he should have stipulated for another by adding terms of condition or forfeiture. That he knew very well how to do this, and had it in mind, as respects breaches of other provisions of the lease, is shown by the following clause: 'A failure to pay the money after demand made, or put down the well, as hereinafter stipulated, shall forfeit this lease within one year from the date hereof.' The inference is strong, therefore, that he did not contemplate similar consequences as the result of a transfer."

Grigg v. Landis, 21 N. J. Eq. 494, was a suit for specific performance by an assignee of a vendee whose assignment had not the consent of the vendor, as required by the contract of sale. In passing upon the effect of a breach of the provision requiring the vendor's consent to the assignment of the contract, the court says:

"But there is no clause of forfeiture or re-entry for condition broken in the agreement. Certainly this court will not interpolate a forfeiture. Where there is no clause of avoidance or of re-entry, a breach of the covenant will not work a forfeiture or determination of an interest in lands. * * * The usual and proper

> remedy for such a breach is an action for damages. * * * But the restriction upon alienation, whether it be called a condition or a covenant, did not exist after the installments of purchase money had been paid and the improvements essentially made, and there is no difficulty in giving the assignment effect between all the parties at that time and affording relief to appellant."

Hence, when an existing interest is assigned in violation of an agreement not to assign without consent, the assignment is nevertheless good and enforceable against the party whose consent is required. If the contract reserves no other remedy the only remedy lies in damages.

Appellant further contends, in this behalf, that it appears from the contract that it was not the intention of the parties to require the consent of the board of public works to an assignment of moneys to any person, other than a subcontractor, and merely for the purpose of security. The provision relating to consent is but a portion of the following single paragraph:

> "No subcontract shall relieve the contractor of any of his liabilities or obligations under this contract. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the board of public works."

The words "like consent" refer to the consent of the board of public works to assigning or subletting the work under the contract, provided

for in a previous portion of the same subdivision, found on page 296 of the transcript.

This provision is incorporated in the "General Provisions" of the "Specifications" annexed to the contract, and terminates that portion thereof termed *"Sub-contracts"* (pp. 296-297 Tr.). The subject matter of this "Sub-contract" portion of the "General Provisions" is assignment and subletting of the work. The provision requiring the consent of the board of public works to the assignment of moneys occurs in the last sentence of the last paragraph, the introductory sentence of which still deals with the subject of *subcontracts.* As the whole subdivision is devoted to the requirements for and manner of assigning or subletting work under the contract, obviously the covenant or condition under consideration must be construed to have some connection with the general subject "Sub-contracts", unless the context forbids such construction. The Circuit Court of Appeals has taken the stipulation against assignment without consent as if it appeared in the body of the contract, and held that it "plainly stipulates against the assignment of the payments". We respectfully contend that when the provision is read as a portion of the specifications, and in connection with what precedes it, it does not stipulate against assignments of moneys which belong to the contractor. The stipulation is introduced by the words: "No subcontract shall relieve the contractor of his liabilities or obligations under

this contract." Then, immediately following and as a part of the same paragraph, "He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the board of public works." It will be noted that the term "moneys payable" is very vague and general: not moneys payable to the contractor, nor moneys earned by the contractor, but moneys to be earned while the contract remains executory. We contend that this provision governs only the dealings between the contractor and subcontractor. It stipulates that if the contractor assigns or sublets the work, the city may still look to him as a surety for its proper performance; and that he shall not assign to any subcontractor the money *to be earned* by performance of the work under the contract, unless with the consent of the board of public works, obtained in the same manner required for assigning or subletting the work. If this consent is not obtained, the contractor will be the only one recognized by the board in authorizing payments under the contract. The whole scheme of this portion of the contract is to compel the contractor to exercise his personal control, unless he assigns to a person who is acceptable to the board of public works, both as to his ability and reliability. In short, this provision relates to moneys, and the contractor's claim to moneys, payable under the contract *while it is executory,* and has no reference whatever to

moneys which have been earned by the contractor through performance of a specific portion of the work, and which the board of public works have by resolution converted into a debt due to the contractor from the city.

This interpretation is also demanded by the fact that the provisions relating to *payments* are found in another part of the specifications annexed to the contract (pp. 135-136 Tr.). No covenant or condition is found here requiring the board's consent to assignment of *payments*. No reference whatever is here made to the provision under "Sub-contracts". On the contrary there exists only the absolute, unqualified covenant that upon the "estimate being made, the City and County of San Francisco will pay or cause to be paid to the contractor in the manner provided by law an amount equal to 75 per cent of said city engineer's estimate".

This interpretation is further demanded by the reason or purpose set forth in the contract for requiring the consent of the board of public works. For the assignment or subletting of work, consent of the board of public works is required, and for the assignment of moneys payable under the contract *"like consent"* is required. By reference to page 296 of the transcript, it appears that the purpose for requiring the consent of the board is to enable the board to know the identity of the assignee, and to determine his responsibility and standing. Certainly, none of these reasons for

requiring the board's consent can apply to the assignment of earnings which are no longer payable under the contract, but which are payable under the authorization of the board itself, and constitute a chose in action in the hands of the contractor. When the board has determined that a certain amount of money is due to the contractor, and has ordered it paid, the character of the assignee who then takes title can be of no concern to either the board of public works or the city.

Before closing our argument, on this point we will make one more observation. The consent required is that of the *board of public works.* Under the Charter of San Francisco, the board of public works, upon their approval of the demand, had taken final action, as far as it was concerned. Now the question presents itself: If it was the intent to prohibit the assignment of the moneys earned by the contractor, *after the work was done,* and *after the moneys were ordered paid,* why should the consent of the board of public works be required?

That body could not possibly be interested in the disposition of such money by the contractor because of any of the reasons set forth in the contract for requiring consent to its assignment.

It appears, therefore, that while the board of public works had in mind, in drawing up its contract, the fixing of remedies for breaches of its provisions, it declared that the failure to comply

with, or the neglect to perform them should be deemed a *breach of contract,* or at most give the board the right to declare the *contract* terminated. Not one word in reference to the *assignment* in such cases is to be found in the whole instrument. It does not provide that it shall be *void,* or that it shall be *unenforceable,* or that the assignee *shall acquire no rights under it.*

And it further appears that this provision requiring consent refers, on a reasonable interpretation of the contract, to the *benefits* to accrue therefrom by the performance of the *burdens* imposed thereby.

Point Two—Assignment.

If the decree of the Circuit Court of Appeals herein is erroneous for the reason stated, it cannot be supported on the ground that the assignment is invalid in any other respect.

Lest it should be urged that the assignment is void for *some other reason,* we will anticipate the contingency by briefly stating the appellant's position in the following pages.

The facts establish four points:

First: *The bank had no intention of making the loan without security.* When the managing officers of the company called on the bank for the loan the president of the bank asked the general manager of the company what *collateral security* he had to offer

therefor (p. 139 Tr.). Furthermore, the bank officials required the order on the auditor to be *presented and accepted* at the auditor's office, before accepting it as collateral (pp. 140, 141 Tr.).

Second: *The company did not intend or expect that the bank would advance $35,000 without collateral security.* When the general manager of the company visited the bank for the purpose of getting this loan *he had with him* an order on the auditor authorizing and empowering the bank to draw the warrants (p. 139 Tr.), and also certified copies of three resolutions of the board of public works allowing the progress payments under the contracts (p. 140 Tr.). When the general manager of the company finally turned these documents over to the bank, "he intended that said order should be a complete assignment of the full amount of the three warrants set forth therein" (p. 141 Tr.).

Third: *The security was,* at the time it was given and accepted, *a debt due from the city to the contractor* (as decided by the Circuit Court of Appeals p. 316 Tr.), and the *lawful subject of assignment.*

Fourth: *The collateral security was given and accepted for a* present valuable consideration (pp. 141, 142 Tr.).

We believe that under the laws of California the assignment was a legal assignment; but, whether viewed as a legal or as an equitable assignment, all the elements of a valid assignment are present. The case of *Fourth Street National Bank v. Yardley,* 165

U. S. 634, involved facts which were very similar to the facts of this case, and the Supreme Court of the United States after reviewing the circumstances under which a *check* had been given for a loan, concludes as follows:

> "It could not be reasonably conceived that the loan would be made without reference to the assignment of the fund from which alone the hope of immediate payment was to be reasonably expected * * * The transaction, therefore, was a proposition to borrow on the one hand, accompanied by the disclosure that security was necessary, and tendering the security, and on the other hand, an acceptance of such proposal and an advance made on the face of it."

The facts in that case were not as strong as in the case at bar, for all the bank held in that case was a *check* which is ordinarily held not an assignment *pro tanto,* while in this case the *order* was for the *whole fund.* Yet the court carefully examined the *circumstances* under which the check was given and received, and concluded that in the light of those circumstances an assignment was *intended.*

Mr. Justice Story, in the case of *Mitchell v. Winslow,* 17 Fed. Cases p. 533, states the rule as follows:

> "It seems to me a clear result of all the authorities, that whenever the parties, by their contract, intended to create a positive lien or charge upon real or personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons

asserting a claim thereto, under him, either voluntarily or with notice, or in bankruptcy."

In his work on *Equity Jurisprudence,* 13th Ed., Vol. 2, page 366, discussing equitable assignments, Judge Story says:

> "Indeed any order, writing or act which makes an appropriation of a fund amounts to an equitable assignment of that fund. The reason is that the fund being matter not assignable at law nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in equity. * * * An assignment of a debt may be by parol as well as by deed."

The rule is also stated in *4 Cyc.,* page 37, as follows:

> "No particular mode or form is necessary to effect a valid assignment. The assignment *need not be in writing,* and if in writing it may be in the form of an agreement or *order,* or in the form of any *other instrument* which the *parties themselves* may use for the purpose." (Italics ours.)
>
> "An assignment may be inferred from the conduct of the parties."
>
> *4 Cyc.,* 43.

No notice of an assignment need be given.

> *Vol. II, Am. & Eng. Encyc. Law.,* 2nd Ed., p. 1076.

In the case of *McIntyre v. Hauser,* 131 Cal. 11, the court says (p. 14):

> "In order to constitute an equitable assignment of a debt, no express words to that effect are necessary. If from the entire transaction it clearly appears that the intention of the par-

ties was to pass title to the chose in action, then an assignment will be held to have taken place."

But it is not necessary, in this case, to base the appellant's rights on equitable assignment, for under the laws of the State of California the transaction constituted a *legal assignment.*

In the case of *Curtin v. Kowalsky,* 145 Cal. 431, the court (p. 434) says:

> "Prior to the adoption of the codes it was held that, inasmuch as a judgment was not assignable at common law, the effect of such assignment was to transfer an equitable title only, but that such title vested in the assignee all the beneficial interest in the judgment, and gave him the right to enforce it by process in the name of the judgment plaintiff. (*Wright v. Levy,* 12 Cal. 262, 263.) It was said to be property, however, which could be purchased, the same as any other species of property. (Ibid.) Under the code there is no limitation upon the power to assign choses in action, including judgments, and it is clear from its provisions that such an assignment carries legal title to the judgment and that the transfer of the title does not depend upon the fact of there being a valuable consideration. It is provided that 'Property of any kind may be transferred, except as otherwise provided by this article.' (Civ. Code, sec. 1044), and the only exception made in the article is that of a possibility not coupled with an interest. A judgment is therefore property which can be transferred. A transfer is declared to be 'an act of the parties, or of the law, by which the title to property is conveyed from one living person to another.' (Civ. Code, sec. 1039.) It is further provided that 'A voluntary transfer is an executed contract, subject to all the rules of law concern-

ing contracts in general; except that a consideration is not necessary to its validity' (Civ. Code, sec. 1040), and that 'A transfer vests in the transferee all the actual title to the thing transferred which the transferrer then has' (Civ. Code, sec. 1083), and also all of its incidents. (Civ. Code, sec. 1084.)"

This is true even in cases where the assignment is made for security.

In the case of *Gilman v. Curtis,* 66 Cal. 116, the court says:

> "Conceding that it appears with sufficient certainty that the policy in question was assigned by the plaintiff to the defendant, to be held by him as collateral security for certain advances to be, and which were made by him, the legal title to the policy passed by the assignment to the defendant. The court could not, therefore, have adjudged the plaintiff the owner of the policy, and entitled to receive from the insurance company the whole amount due upon it. The interest of the plaintiff in the policy, upon that condition of facts, is in what remains of it after the advances, for the security of which it was assigned, have been satisfied, and defendant cannot be made to surrender it to plaintiff until the advances made by him are repaid."

Widaman v. Hubbard, 88 Fed. Rep., p. 812.

There are no limitations, therefore, on the transfer of choses in action under the California Code, and the question as to whether or not an assignment has taken place is to be determined by the laws and

decisions of this State relating to the transfer of title to personal property.

Butcher v. Cheshire R. R. Co., 125 U. S., p. 583.

Rose, Code Federal Procedure, Vol. I, Sec. 10, notes (a), (aa), and (b).

Besides the sections of the Civil Code of California set out in the portion of the opinion above quoted from *Curtin v. Kowalsky*, the following may be referred to:

> "Section 954: A thing in action arising out of the violation of the right of property or out of an obligation may be transferred by the owner.
>
> Section 1458: A right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such.
>
> The only exception mentioned in the article is under section 1045: 'Possibility. A mere possibility not coupled with an interest cannot be transferred.'
>
> Section 1052: When oral. A transfer may be made without writing in every case in which a writing is not expressly required by statute.
>
> The transfer in question does not come within section 1624, 'What contracts must be written.'
>
> Section 1140: Transfer of title under sale. The title to personal property sold or exchanged passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not."

The word "transfer", as used in these sections, includes assignments.

Curtin v. Kowalsky, supra;

Cross v. Savings Bank, 66 Cal., p. 466.

In the last case the court says:

> "The term assignment refers to a class of acts by which the right or title to something of value is transferred to another before the object of the transfer has become property in possession."

Every requirement of the laws of California to constitute a legal assignment has been satisfied in this case.

> "The transaction * * * was a proposition to borrow on the one hand accompanied with the disclosure that security was necessary and tendering the security, and on the other hand an acceptance of such proposal and an advance made on the faith of it." (*Bank v. Yardley,* supra.)

If we apply the reasoning of that case to this, there is no escape from the conclusion that the bank is a bona fide assignee of the fund represented by the demand for said fourth progress payment; it cannot "reasonably be conceived" that the bank loaned thirty-five thousand ($35,000.00) dollars "without reference to, and assignment of," the only fund out of which it could reasonably expect immediate payment.

The order on the auditor is but one item of the whole transaction of December 6, 1910,—a means given by the company to the bank to carry out the mutual understanding. When, from all the circumstances the *intent to transfer title* appears, that intent will prevail. No *writing* is necessary: *no notice* of the assignment is required to be given. These

principles are fully supported by the following authorities:

Civil Code of California, Sec. 1052, supra;
Curtin v. Kowalsky, 145 Cal. 431;
McIntyre v. Hauser, 131 Cal. 14;
Smith v. Peck, 128 Cal. 530;
Lawrence etc. Bank v. Kowalsky, 105 Cal. 43;
Renton etc. Co. v. Monnier, 77 Cal. 457;
Spain v. Hamilton's Adm's, 1 Wall. 604;
4 Cyc., 7, 37, 43;
9 Cyc., 588.

It is quite immaterial whether the assignment is legal or equitable. In any case, the assignee will be protected.

In this case there is no question of acceptance involved, for the assignment is not of a portion of a fund, but of the *entire* progress payment.

With passage of title to this payment the right to have and receive it vested in appellant, and the assignor parted with all right to possession.

Gilman v. Curtis, 66 Cal. 116;
McIntyre v. Hauser, 131 Cal. 14.

Appellees may contend that the assignor had not parted with complete control of the fourth progress payment, because the demand was in the name of the Metropolis Construction Company, and that it could not be collected without the company's endorsement.

What might happen afterwards, in the collection of the money is entirely immaterial. The fact that the demand was in the name of the contractor is a matter over which the parties had no control. The demand was not assigned until *after it had been drawn up and approved by the proper officials.* This fact would give the assignor no right to draw it or appropriate any of its proceeds.

In the case of *Scheerer v. Edgar,* 76 Cal. 569, the court says:

> "In this case the course of the auditor in making his warrant payable to Friedhofer was proper, notwithstanding the assignment, because the judgment was payable to him, and the order of the board of supervisors directed that the amount should be so paid. Having drawn a proper warrant, the duty of the auditor was ended, and he certainly cannot be compelled to draw a second warrant, still less, to draw one in favor of a party who is not entitled to it under the order of the board. The assignment of the judgment gave to the plaintiff the right to the warrant when it was drawn, and to compel Friedhofer to execute a proper transfer thereof to him, if he refused to do so, but it did not give him the right to compel the auditor to draw a warrant not authorized by law."

This point is treated in a masterly manner by the learned referee, who heard the case under authority to report his conclusions, and his opinion is set forth at pages 157-172 of the transcript.

Point Three—Priority.

Appellees further contended in the court below that appellee Welles was entitled to priority in

virtue of his notices to withhold, under section 1184 of the Code of Civil Procedure of the State of California, supra.

Their contention was, that the fourth progress payment was not due, within the meaning of that section, at the time it was assigned to appellant, because the demand or warrant therefor, after its approval by the board of public works, had still to pass through several prescribed stages in the process of payment.

It appears from the bill of complaint of appellee Welles that his claim was allowed and approved by the referee in bankruptcy as a secured claim. The trustee, the other appellee, represents the general creditors under the bankruptcy law. Hence this question of priority is one that affects the rights of Welles and the bank, only.

In the interpretation of this section, the only point of difference between the parties arises over the word "due" in the following portion: "* * * and he (the person who contracted with the contractor) shall withhold from his contractor * * * sufficient *money due,* or that may become due to such contractor", etc. (Italics ours.)

Welles' right to priority depends entirely upon the "notices to withhold" which are provided for by Section 1184 of the Code of Civil Procedure of California, supra.

A "notice to withhold" under this section is in the nature of a *garnishment.*

Newport Co. v. Drew, 125 Cal. 585, at page 589;

Bates v. Santa Barbara Co., 90 Cal. 543, at page 546;

Bianchi v. Hughes, 124 Cal. 24, at page 27;

Butler v. Ng Chung, 160 Cal. 435, at page 439;

Diamond Match Co. v. Silberstein, 165 Cal. 282, 288.

It is operative only as to moneys then due or that may later become due to the contractor.

As to the moneys theretofore due and assigned by the contractor *prior to the giving of such a notice,* it is inoperative for the simple reason that such moneys are no longer *due* to the *contractor* but to the *assignee.*

First Nat. Bk. v. Perris I. Dist., 107 Cal. 55, page 62;

The Newport Wharf and Lumber Co. v. Drew, 125 Cal. 585, page 589;

Long Beach School Dist. v. Lutge, 129 Cal. 409, 413.

27 Cyc., 231, 232;

Spengler v. Stiles-Tull Lumber Co., (Miss.) 48 So. 966, at page 973.

It is true that a contractor cannot prevent the effect of a "withholding notice" by assigning his rights to payments *before they are due.*

If the fourth progress payment was due to the company on or before December 6, 1910, there can be no question but that it could assign it and its assignee would take title superior to any claims subsequently made by subcontractors by virtue of withholding notices under said section 1184 of the Code of Civil Procedure of California.

When money becomes due under a contract of this kind, is a matter to be determined by the terms of the contract and the provisions of the Charter of the City and County of San Francisco. The following sections are to be found in Chapter I of Article VI of the said Charter:

> "Sec. 22. The work in this Article provided for must be done under the direction and to the satisfaction of the board of public works; and the materials used must be in accordance with the specifications and be to the satisfaction of said board, and all contracts provided for in this Article must contain a provision to that effect, * * *"
>
> "Sec. 11. Said board (of public works) shall appoint a civil engineer * * * who shall be designated the city engineer. * * * He shall perform all civil engineering and surveying in the prosecution of the public works and improvements done under the direction and supervision of said board, and shall certify to the progress and completion of the same, * * *"
>
> (Only the portions deemed material are printed.)

To determine when the money became *due* from the city to the contractor, we must bear in mind that the indebtedness of the city is a different

matter from the demands afterwards made out therefor; and that the Charter provisions governing *approval* and auditing of *demands* are not to be given any weight as determining when the money *became due.* They constitute the *manner of payment* merely.

This may be illustrated by reference to the following Charter provisions:

(Art. IV, Chap. II, Sec. 7.)

> "Every demand * * * must * * * be presented to the auditor, who shall satisfy himself whether the money is *legally due,* etc." (Italics ours.)

Also (Art. III, Chap. III, Sec. 13):

> "Every *demand* * * * shall * * * show: * * * 3. The fiscal year within which the *indebtedness was incurred.*" (Italics ours.)

It seems clear that no *indebtedness* could be incurred unless money was *due,* and that the indebtedness must *precede* and *give rise* to the *demand.*

The contract under consideration is between the company and the board of public works and the contract and the Charter, both require that the work "shall be done under the *direction* and to the *satisfaction* of the board of public works." (p. 157 Tr.)

The contract provides, also, "progressive payments for said work to be made, as provided for in the specifications therefor." (p. 135 Tr.)

The specifications provide:

> "In order to assist the contractor to prosecute the work advantageously, the city engineer shall on or about the last day of each month make an estimate of the value of the labor done and materials incorporated in the herein proposed work by the contractor.
>
> * * * * * * *
>
> *Upon each such estimate being made,* the City and County of San Francisco *will pay or cause to be paid* to the contractor in the manner provided by law, an amount equal to 75 per cent of said city engineer's estimate" (pp. 135, 136 Tr.) (Italics ours.)

Hence, the fourth progress payments became due to the contractor upon the *estimates* being made by the engineer and the board of works signifying their *satisfaction with the work.*

Where a public building contract provides that the work shall be done under the direction and to the satisfaction of a designated official and the work is done to his satisfaction, payment therefor cannot be refused, unless it appears that there was some fraud or mistake on his part.

Moore v. Kerr, 65 Cal. 519, at page 521.

Cited with approval in

American-Hawaiian Eng. Co. v. Butler, 165 Cal. 457, at page 513;

California Sugar Agency v. Penoyer, 167 Cal. 274, at page 279.

In the latter case, at page 279, the court states:

> "Nothing is better settled than the rule that where the parties agree that the performance

or non-performance of the terms of a contract, or the quantity, price or quality of goods sold, is to be left to the determination of a third person, his judgment or estimate is binding, in the absence of fraud or mistake."

The fourth progress payment estimate was made by the city engineer on December 3, 1910. This estimate was approved by the board of public works on December 5, 1910. On the same day, the board of public works by resolution, authorized a fourth progressive payment to said company, and a "Demand on the Treasury" in favor of the company for said payment was approved by the board of public works. (p. 138 Tr.)

In the case of *The Newport Co. v. Drew,* 125 Cal., p. 589, the court says:

> "The contractor cannot prevent the effect of this notice as to any payments that may mature after it is given, but its effect on payments that have *matured, before it is given, but which have not been made,* is to be determined by the rights of the contractor in reference to them. If he is still entitled to demand their payment from the owner, such payment is intercepted by the notice, *but if he has already assigned them to a third party the notice will be inoperative to prevent their payment* to such party. (Code Civ. Proc., Sec. 1184; Bates v. Santa Barbara County, 90 Cal. 543; First National Bank v. Perris Irr. District, 107 Cal. 55." (Italics ours.)

On pages 589 and 590 the court says:

> "The provision in the contract for the payment of ninety per cent of the value of the materials used and labor performed 'as the work

progresses', with the condition that, before any payment should be made, the superintendent of construction should, not oftener than once a month, furnish an estimate of such labor and materials, with the amount due thereon, rendered such installment of the contract price due and payable immediately upon the *acceptance of the work* by the trustees. The contract provided that the work should be done to the *satisfaction* of the board of trustees, and the contractors were not entitled to demand payment of the amount of the estimate until after such approval and acceptance. Their approval of the estimate and direction for its payment implied their satisfaction with the work without any formal declaration to that effect. Upon such approval and direction the *obligation* of the state which had been created in favor of the contractors by the trustees *became complete,* and the right of the contractors to *immediate payment became vested* in them and was subject to their *disposition.*" (Italics ours.)

On page 592, is the following:

"Upon their (trustees) acceptance of the work the contractor became immediately entitled to the payment of the amount of the estimate."

Hence, the *estimate* and *satisfaction with the work* were the elements which fixed the *obligation* to pay.

Hence, upon the completion, *estimate,* and *acceptance* of the *work,* or any *progressive part thereof,* the *contract price,* or *proper portion thereof,* becomes immediately *due* and payable; thereafter, the *approval* of the *demand* for such price, or part thereof, is a plain *ministerial duty.*

The demand is nothing more than a bill presented to the city for the amount of the debt incurred.

The distinction between the debt and the demand is further illustrated by the Newport case in this: The court decided that upon the *estimate* of the superintendent and *acceptance* of the work by the trustees, the right to *immediate payment* vested in the contractors; but immediate payment could not be obtained. Reference to the Political Code of California then in force will show that the controller *could not draw his warrant, until* the state board of examiners had *approved* the demand.

> "Sec. 672. CONTROLLER NOT TO DRAW WARRANT FOR CLAIMS NOT AUDITED BY EXAMINERS. The controller must not draw his warrant for any claim unless it has been approved by the board * * *"
>
> Sec. 433. It is the duty of the controller: * * * 10. To audit all claims against the state in cases where there are sufficient provisions of law for the payment thereof. * * * 17. To draw warrants on the treasury for the payment of moneys directed by law to be paid out of the treasury; * * *"

All this required time and precluded any idea of *actual, immediate payment,* in point of fact. These steps may be regarded, however, as successive acts in the process of payment. The following language is pertinent here:

> "The provision in the contract for the payment of the *contract price* in *controller's warrants* on the state treasurer *did not affect* this power of disposition, or *right to immediate payment,* or suspend its exercise until such war-

> rants should be obtained. The failure or neglect to obtain a warrant *immediately* upon the *approval* of the estimates would have no greater effect than a similar failure on the part of the contractor, in case of an ordinary building contract, to obtain a *check* from the owner *immediately* upon receiving the architect's certificate that the installment is payable." (Italics ours.)
>
> *The Newport Co. v. Drew,* 125 Cal. 590.

The board of examiners act in the same capacity on claims against the State as do our board of supervisors on claims against the city, and the controller acts in the same capacity as our auditor. Yet, in the Newport case the court decided that the approval of the board of examiners was not required to make the demand due.

The *measure* and *approval* of the work *create* the indebtedness and *fix* the obligation of the city to pay; the approval of the demand authorizes the treasurer to disburse the money.

Under the law, therefore, there was no *part* of the fund upon which the notice of Welles could operate. In the case of *First National Bank v. Perris Irrigation District,* 107 Cal. 62, the court says:

> "If the contractor, previous to the giving of the notice (under said Sec. 1184) has transferred to another, who takes the assignment for value and without notice of the latent equities of the materialmen, the amount then actually due and payable on the contract, there is nothing either due or to become due to him, and there is no fund on which the notice can operate."

In this case the board of public works occupies the same position as the trustees, and the city engineer the same position as the superintendent of construction, in the Newport case. It is to be noted that the trustees in the Newport case had the right to *approve payments* under that contract and they were also the parties to be *satisfied* with the *work*. In them, under the law and the contract, were centered the two functions of *accepting the work* and *approving the payments therefor*.

To understand the decision in the Newport case, it is essential to keep in mind the *dual* capacity in which the trustees acted. The distinction between the trustees' approval of the *work* and their approval of the *payments* is constantly referred to throughout the decision. When, by any act, they signified their *approval of the work*, the *right of the contractors* to immediate payment *became vested* in them.

We also call particular attention to the following extract from the case of the *Newport Co. v. Drew*, supra, page 592:

> "By the terms of the contract the work was to be done to the *satisfaction* of the board of trustees, as well as that of the superintendent of construction, and the *approval* by the *trustees* of the several *estimates* when presented operated as an acceptance of the work done on the contract prior to the dates of such approval. Their function, however, was merely to declare their approval or disapproval of the work and to determine its conformity with the terms of the contract, while the function of fixing the

amount of the payment, both under the statute and by the terms of the contract, devolved upon Goff. *Upon their acceptance of the work* the contractor became *immediately entitled* to the *payment* of the amount of the *estimate.*" (Italics ours.)

The board of public works is the body under the Charter to *make the contract* on behalf of the city, and to *fix the city's obligations to pay money* thereunder.

The auditing and approval by the several persons and bodies thereafter are only the prescribed steps in the liquidation of the debt. The auditing and approval are ministerial duties, except in so far as they may act as checks upon an unlawful expenditure of funds by the departments.

Sec. 19 (of Article II, Chapter I) provides:

"Except as provided in Chapter III of Article III of this charter, all demands payable out of the treasury must, before they can be approved by the auditor or paid by the treasurer, be first approved by the board of supervisors. All demands for more than two hundred dollars shall be presented to the mayor for his approval, in the manner hereinbefore provided for the passage of bills or resolutions. All resolutions directing the payment of money other than salaries or wages, when the amount exceeds five hundred dollars, shall be published for five successive days (Sundays and legal holidays excepted) in the official newspaper."

The object of the Charter, by requiring different formalities for different amounts, is very apparent. It is not to give materialmen and laborers a chance to file liens, because, in the first place they cannot

file claims of lien against public works; and because, in the second place, they could, under section 1184 of the Code of Civil Procedure, give their notices to withhold *before* they started to furnish material or perform their labor. The intent of the Charter is to give the citizens a chance to protest in case it should appear that the departments are unlawfully expending the public money.

An opinion of Hon. Franklin K. Lane, written while he was our city attorney, throws a clear light upon the functions of the supervisors in these matters:

> "The duty imposed upon the board of supervisors of approving all demands upon the funds set aside for departments which are given exclusive control over their appropriations is of purely ministerial character, except in so far as it acts as a check upon such departments against the expenditure of more than its appropriation permits, or protects the city and county against expenditures of an unlawful character. The board of supervisors, at the beginning of each fiscal year, must set aside appropriations for the departments named, and at such time may, by the appropriations so made, limit and control the expenditure of such departments for such fiscal year. But, after such appropriation has been made, responsibility for its expenditure rests entirely on the department to which it is allotted. The legislative department provides the funds, the administrative departments expend them, and each is to be held responsible within its own province. The administrative departments are made responsible for the manner in which the moneys so appropriated are used." (Opinions of ex-City Attorney Franklin K. Lane [1899-1902], pp. 180, 182—Charter of San Francisco, annotated by W. S. Church, p. 22.)

In conclusion, we desire to state that Welles, in his bill of complaint (p. 10, Tr.), alleges that this fourth progress payment became due on December 5, 1910, on estimate by the city engineer and approval by the board of public works, by its resolution duly made and adopted.

Point Four—Law of the Case.

Before concluding this brief, we will notice the final point raised by the exceptions of appellees in the Circuit Court of Appeals.

Appellees contended that a certain "memorandum opinion" and minute order of the District Court, dated December 12, 1911 (pp. 113, 114, Tr.), finding that appellee Welles was entitled to the relief demanded in his bill of complaint, were conclusive as the law of the case, and fixed the right of Welles to a final decree in his favor in the absence of new or changed findings by the referee.

Appellant at that time refused to submit its claim to the jurisdiction of the District Court, and set forth the reasons for its refusal in its amended return to the order to show cause issued by the court (pp. 54-61, Tr.). Exceptions were filed to this return (p. 62, Tr.), and the case as it *then* stood was referred to a referee to find the facts (p. 78, Tr.). Upon the report of the referee, to which there was no exception, the "memorandum opinion" and minute order referred to were made. They amounted to

nothing more than the overruling of appellant's objection to the jurisdiction, as that was the only matter before the court, as far as concerned appellant.

The record upon which the "memorandum opinion" was based did not include the answers of the trustee or the bank (p. 93, Tr.). The object of the suit was the trial of a question of title, and the relief asked, and awarded at that preliminary stage of the suit, was injunctive, and mandatory, to preserve the *status quo,* and to insure the power of the court to enforce its ultimate decree (p. 115, Tr.).

The case up to and including December 12, 1911, was still open for the proper decree. On the next day, *December 13,* a formal order (p. 115, Tr.) granting complainant *specific relief,* was made and filed. Then, on the 15th day of December, 1911, a *writ of injunction and mandamus* (p. 116, Tr.) was issued.

No decree having been given or entered upon the "memorandum opinion" and minute order, other than the order of December 13th, which was *signed by the judge,* it must be conclusively presumed that this order, which was the last deliberate direction to the clerk, was the ruling and only ruling, at that stage of the case. This finds ample support in the following authorities:

Estate of Cook, 77 Cal. 227, 11 Am. St. Rep. 267;

Byrne v. Hoag, 116 Cal. 1;

O'Brien v. O'Brien, 124 Cal. 422;
Belger v. Sanchez, 137 Cal. 618.

Law of the case applies only to decisions of appellate courts, and it is not only within the power, but it is the duty, of a *nisi prius* court to change its ruling of law during the progress of a case when such ruling was erroneous, and was not followed up by an appealable order.

Lawrence v. Ballou, 37 Cal. 521.

But, since the "memorandum opinion" cannot be looked on as stating *the law of the case,* can it be regarded as *res adjudicata* of what was never adjudged?

If the memorandum opinion was ever intended to have the effect contended for by the appellees (which we deny), then the court was at liberty to change that opinion at any time before a decree was entered.

In other words, the lower court is absolutely footloose, at all stages of a case pending therein, to change its opinions, until it has deprived itself of the power to do so by the giving and entering of an appealable order or decree, and that order or decree, and not the opinion once held by the court, is the ruling on the matters therein adjudged.

> "It is a most common occurrence for a trial court to change its rulings during the progress of a trial, upon questions of law, and no one would contend that it is not within its power

to do so, or that it should not do so when satisfied that its former ruling was erroneous."

De La Beckwith v. Superior Court, 146 Cal. 499.

As no *final decree* was ever made or entered on the "memorandum opinion" and minute order of December 12, 1911, (which were merely *directions for a decree*), and as the court changed its opinion and substituted in its place *that of January 18, 1913,* (p. 183, Tr.), which was duly followed by *minute order* (p. 185, Tr.), ordering a decree for the bank in accordance therewith, which was duly followed by a *final decree,* the first and only one in the cause (p. 186, Tr.), the doctrine of *res adjudicata* has no application. See

Freeman on Judgments (4th Ed.), Sec. 251.

These observations eliminate *Loewe v. Federation of Labor,* 189 Fed. 714, relied on by appellees in the court below. There, an order for injunction was made and a writ of injunction issued on the preliminary hearing; here, no order was made prior to final decree except that of December 13, 1911. There, the ultimate relief was injunction; here, was involved a question of title, and the preliminary relief was only *collateral* to the issue. There, the opinion of Judge Morrow (139 Fed. 71) announced *"principles"* which Judge Van Fleet found were *supported* by the *facts* on final hearing; here, the "memorandum opinion" announces *no principles.*

Again, injunction suits are peculiar in that the ultimate relief is of the same quality as the inter-

locutory relief. Hence, if an interlocutory injunction has been granted after a hearing, and the facts on final hearing support the interlocutory order, there would be merely a *strong reason* for perpetuating the injunction.

But to hold that the "principles announced" in an opinion in a court of *nisi prius* become "the law of the case", as an *absolute rule* binding the action of that court on final hearing, even though error should appear, is not, we submit, supported by authority.

Rodgers v. Pitt et al., 129 Fed. 932;
High on Injunctions (4th Ed.), Sec. 5;
Andrae v. Redfield, 12 Blatchf., p. 425.

Finally, the "memorandum opinion" of December 12, 1911, merely states that * * * "it is my conclusion that the complainant is entitled to the relief demanded in the bill of complaint."

Now, *at the time of this opinion*, what was the relief demanded in the bill of complaint?

It was merely (in substance):

That the auditor be required to surrender the demand on the city treasurer to the trustee;

That the trustee be required to account with complainant;

That the Portuguese-American Bank be required by due process of this court *to make answer* to the bill and *to assert in this court* its claim to said warrant and to *abide the judgment* of this court;

That the bank be enjoined from *further proceeding* with its *mandamus suit* in the state court (p. 24, Tr.);

Subsequently, on *April 16, 1912,* complainant, by leave of court, filed an *amended prayer* to his bill of complaint demanding *further* and *more specific relief* (p. 128, Tr.).

As the answer of the bank was not before the referee, its time to plead not having expired, and as no argument on the merits had been made by appellant before either the referee or the court, a final order or decree of the court upon the merits of the action would have been premature, and it is not to be presumed that the expression of opinion in the memorandum meant anything more than that complainant was entitled to the relief asked for in the order to show cause.

Such was the construction placed upon the "memorandum opinion" by the parties, for the decree that was entered, aside from confirming the report, granted an injunction *pendente lite* against the bank and ordered Auditor Boyle

> * * * "to deliver the same (the demand) to defendant John Daniel as trustee herein, to abide the result of this action the proceeds to be distributed to whomsoever *shall be lawfully entitled.*" (Italics ours.)

If this was not the relief to which Mr. Welles was entitled under the "memorandum opinion", then why did he take that decree?

In conclusion, we submit that this highly technical contention of appellees, so persistently urged before Judge De Haven, himself, and by him overruled (p. 128, Tr.); and before Judge Dietrich, and

by him overruled (p. 183, Tr.), is not only unsupported by reason or authority, but is utterly untenable on the record.

While the Circuit Court of Appeals has by its decree reversed the case upon the point first considered in this brief, we have given cosideration to the other points urged before it to show that on no view of the case can its decree be sustained.

For all of which reasons we respectfully submit that the decree of the Circuit Court of Appeals herein should be reversed.

San Francisco, California,
April 1, 1916.

Respectfully submitted,

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